84-1052

No.

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IN THE

Supreme Court of the United States

October Term, 1984

DOROTHY P. FISHMAN,

Petitioner,

vs.

MARGARET M. HECKLER, Secretary of Health and Human Services,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented.

(1) Whether Appellee's failure to follow her own regulations to Appellant's detriment triggers the protection of the due process provision of the Fifth Amendment to the Constitution?

(2) If no transgression of constitutional dimension exists, whether the instant case is distinguishable from *Califano v. Sanders*, 430 US 99 (1977), on other grounds, affording the District Court subject matter jurisdiction to review the Secretary's decision?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984.

DOROTHY P. FISHMAN,

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MARGARET M. HECKLER, Secretary of Health and Human Services,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

Citation of Prior Decisions.

Neither the memorandum decision of the U.S. District Court for the Southern District of New York (82C 852) nor the order of the U.S. Court of Appeals (84-6158) for the Second Circuit affirming that decision has been reported and are therefore incapable of citation. Accordingly they are set forth in the Appendix hereto, *infra*, at a1-a8. Likewise the Appellee's various determinations during the course of the Agency proceedings which led to

this series of Appeals are set forth in the Appendix, *infra,* at a9-a21.

Jurisdictional Statement.

On October 3, 1984, the U.S. Court of Appeals for the Second Circuit entered a judgement affirming a decision of the U.S. District Court finding that it had no jurisdiction to review Appellee's final decision under 42 USC 405(g) pursuant to the rule of *Sanders v. Califano,* 430 US 99 (1977).

Plaintiff-Appellant now petitions for certiorari pursuant to 28 USC §1254 (1) and Rule 20 of the Rules of the Supreme Court of the United States.

Applicable Law.

This petition for certiorari requires consideration of the statutes and regulations which are reproduced in the Appendix at a43-a59.

More specifically they are:

42 USC:
405(a), (b), and (g)
423(d)(1)(A)

20 CFR (1981)
404.957
404.967, 968(a)(1), 969, 970, 971, 972, 973, 975, 976(a) and (b)
404.987, 988(a) and (b), 989
404.1525(a)

20 CFR (1980):
404.947
404.937(a)

Office of Hearings and Appeals Manual:
§1-922-10
§5-42-16

Statement of the Case.[1]

On January 1, 1976, Plaintiff-Appellant, an elementary school teacher, sustained a serious and incapacitating injury to her left knee while playing tennis. She was then 48 years of age, having been born on March 17, 1927.

As the direct result of this injury and its sequelae, she has never been able to return to any form of work and was in fact retired by the Board of Education due to this incapacity. On June 1, 1976, she filed her first application for disability benefits under the Social Security Act (hereinafter Act) (a23-a26)[2]. Appellant denied her claim on the ground that her condition, although severe, was "not expected to be severe for a continuous period of 12 months" (a9-a11). She was as well advised that if the condition did not improve as expected, she "should get in touch with any Social Security Office" (*ibid.*). A subsequent timely request that the initial decision be reconsidered resulted in a denial for the very same reason (a12-a14) and she appealed no further.

On May 7, 1980, Appellant, again unaided by Counsel, filed her second application for benefits again stating that

[1]References to the Appendix herein are designated by an "a" preceding the page numbers. Page references preceded by TR refer to the certified record filed by the Secretary, transfer of which has been requested from the Court of Appeals to this Court. The Clerk of the Court of Appeals has refused to transfer the record except on request of this Court. We urge the Court to examine it.

[2]The letter of denial dated 9/1/76 was apparently predicated on 42 USC 423(d)(1)(A) requiring that a disabling condition last or reasonably be expected to last for at least 12 months.

her disability began January 1, 1976. This application, too, was denied both initially and on reconsideration (a15-a18). Appellant thereafter filed a timely request for a hearing at which the sworn testimony of three witnesses was taken and much documentary evidence *not presented* in support of her first application was received and considered by the Administrative Law Judge (hereinafter ALJ).[3] This led him to conclude that Appellant had in fact

[3]This additional evidence in part consisted of testimony given by Mr. and Mrs. Fishman as well as a treating psychiatrist, Dr. Nir. The additional documentary evidence consisted of psychiatric and other medical reports as well as records relating to three hospitalizations between March 1976 and November 1976 regarding the treatment of her knee injury which required, among other things, surgery, a manipulation under anesthesia and traction (TR 49, 145-6, 137).

This evidence as well showed that Appellant underwent physical therapy including a variety of measures such as swimming (TR 51-2), heat, exercise with pulleys and weights, etc. (TR 44-7, 51-2, 158-9, and 137). Because the measures were unavailing she developed a psychiatric problem, severe headaches, high blood pressure and dizziness (TR 50-1, 117, 133-4, 157, 160). Her anxiety and desire for recovery led to the ingestion of dangerous steroid medications which caused internal bleeding that frightened her all the more (TR 54-6). Because her incapacity continued she as well became fearful of further injury (TR 56-7) and testified:

> "It was really beginning to drive me crazy, this leg, my knee" (TR 54).

Appellant's psychiatric condition was borne out by the report and testimony of Dr. Nir (TR 139-40; 79-96) who considered her to suffer from a "Massive phobic state" and "depression." Dr. Nir's opinion finds support in the psychiatric report of Dr. Pike, Appellee's own consultant (TR 142-3), and in the testimony of Mr. Fishman (TR 74, 76). Both Dr. Nir and Mr. Fishman offered testimony that the psychiatric problem began during the first year of her illness (TR 85, 76) which is consonant with Appellant's own statements. Dr. Nir further opined that her psychiatric condition was serious enough to meet the requirements of §12.04 in Appellee's Listing of Impairments contained in Appendix 1, to Subpart P, 20 CFR, Part 404. Such conditions are presumed disabling. See 20 CFR 404.1525 (a)(1981).

This mass of evidence which is uncontradicted in the record not only represents a continuum of impairment since January 1, 1976, but as well stands in dramatic contrast to the two reports of Dr. Pisani which constituted the only medical information considered by Appellee before denying Appellant's 1976 application initially and on reconsideration (a27-a28).

been disabled from January 1, 1976, however, he denied Counsel's request to reopen the 1976 application on the patently incorrect premise that Appellant was obligated to have exhausted her administrative remedies in connection with her 1976 application in order to be eligible for a reopening[4] (a20).

The Appeals Council was then requested by letter of April 20, 1981 (a28-a29), to review the ALJ's determination *only* in so far as it denied a reopening of the 1976 application on erroneous grounds. An Appeals Council analyst recommended a modification of the decision to reflect a later onset date (4/25/80) (a30-a35) than that found by the ALJ (1/1/76)[5] and would have resulted in a final decision reviewable under 42 USC 405(g). However, David Danziger, an Appeals Council Member who initially signed a written proposal to so modify the decision (a36-a37), apparently changed his mind in favor of issuing an "Order" which did not procedurally and substantively conform to the requirements of Appellee's regulations. In this "Order" he not only modified the onset date of Appellant's disability but as well dismissed the request for hearing insofar as it dealt with the previously adjudicated period which he considered "*res judicata.*" The very purpose of this action as stated in his own handwritten note

[4]The reopening requested was governed by 20 CFR 404.987-989 (1981) (a54-a55). The text of these regulations makes it quite clear that Appellee was not disqualified for such relief for the reason advance by the ALJ. Moreover section 1-922-10 of the Office of Hearings and Appeals Manual (a58-a59), Appellees operating instructions for ALJs, makes it quite clear that the instant situation fell within the guidelines for reopening.

Based on the ALJ's findings, Appellant received benefits commencing in May 1979 (a41-a42), however had the 1976 application been reopened Appellant would have received benefits from June 1976 totalling approximately $15000.00 ($428.50 x 35).

[5]The analyst's notes were obtained under the Freedom of Information Act (hereinafter FOIA).

was to make an otherwise reviewable action of the Appeals Council unreviewable by the District Court[6] (a38-a40).

[6]The text of this handwritten note which in fact became the decision of the Appellee was discovered under the FOIA and is as follows:

"MR. WALRAVEN BCT# 2-308

Your proposed action is sound but it is not practical under the circumstances. The claimant has already been paid retroactively to 1979 and if we turn that into an overpayment we would have to waive recovery anyway because of operation of law (20 CFR) 404.510a and 404.512 (a). The AC (Appeals Council) action would be appealable to Court. We can send a denial letter *without Court* Rights pursuant to SSR 77-78 but that would be contrary to AC Policy in this case. However what I want to do is issue *an order of the Appeals Council*—not subject to Court Review holding that the App. C. (Appeals Council) agrees with Counsel that *if* the evidence currently submitted were new and material to the previously adudicated period so that establishment of the original AOD (alleged onset date) were justified reopening of the prior application would be appropriate. The ALJ's basis for his refusal to reopen is erroneous under 404.1587, 404.1588 and 404.1589 (Counsel in fact cited 404.987, 404.988 and 404.989) as cited by Counsel.

The AC notes that although Counsel was given only 20 days to review the facts, he actually had 6 months to compose his brief on this issue.

While the AC is not necessarily convinced that the evidence now of record establishes the existence of a disabling impairment prior to 9/25/80, it is clear that no evidence has been introduced which is new and material as to the claimant's physical impairment during the previously adjudicated period. Indeed the current evidence submitted by claimant shows that her knee condition *alone* is not now and has not been totally disabling for any continuous period of 12 months. Moreover, there is no evidence that her emotional impairment although apparently related to her traumatic knee injury, required or received any medical treament during the previously adjudicated period.

Accordingly, there is no basis for reopening the reconsideration determination of 9/1/76 which became the final decision of the Secretary when claimant did not request a hearing. Thus the claimant's non-disability through 9/1/76 is *res judicata,* and the claimant's request for hearing insofar as it dealt with the previously adjudicated period should have been, and is hereby dismissed. This action of the AC will not adversely affect claimant's date of entitlement but may affect the amount of her monthly benefits. The appropriate component will advise CLMT (Claimant) in this regard. Danziger" (Emph. in original; parenthetical insertions for clarity ours. See a38-a40).

Subsequently, Appellant sought review of the Secretary's final decision in the U.S. District Court for the Southern District of New York. The Hon. Robert J. Ward determined that the court lacked subject matter jurisdiction to review the dispute and dismissed Appellant's complaint (a8). An appeal followed to the U.S. Court of Appeals for the Second Circuit and proved fruitless (a1-a3). That Court held in effect that the District Court was correct in its view and that the principles of *Califano v. Sanders,* 430 US 99 (1977), were herein controlling. For reasons stated, *infra,* Appellant now seeks certiorari.

Reasons for Granting the Petition.

I.

Appellees' failure to follow her own regulations with the specific intent of defeating Court review which is statutorily guaranteed constitutes a violation of due process.

Careful analysis of the various actions taken herein makes crystal clear that neither the ALJ nor the Appeals Council acted within the constraints of Appellee's duly promulgated regulations in dealing with the reopening of Appellant's first application for benefits.

As already noted, the ALJ sought to impose a self-conceived standard of eligibility by requiring Appellant to have exhausted her administrative remedies in connection with her 1976 application. So contrary was this position with Appellee's own regulations (20 CFR 404-987-989)[7] that even the Appeals Council agreed that the ALJ was sadly in error (a38-a40) when he so premised his denial.

[7]In his memo (note 6, ante) which became the Order of the Appeals Council (a21-a22) it was stated that Counsel had cited 404.1587-1589 as the rules applicable to reopening. This was in fact an error of restatement as Counsel had indeed cited 404.987-989 (TR 8-9).

The Appeals Council at the insistence of one member, David G. Danziger, then went on to commit a series of transgressions in its own right which were no less serious than that of the ALJ. For example, after conceding in light of the ALJ's error that an onset date of January 1, 1976, would warrant a reopening, he proceeded improperly to adjust the onset date of Appellant's disability and dismiss that part of her request for hearing which pertained to the period adjudated in 1976 which he found to be *res judicata.* As readily appears from Mr. Danziger's memo (note 6, ante), this approach was adopted over the analyst's recommendation (a38-a39) because it would deprive Mrs. Fishman of her "Court rights." In so doing, he completely ignored the limitations on Appeals Council authority clearly articulated by the regulations (20 CFR 404.967—976 1981).

For example, on August 5, 1980, Appellee adopted certain regulations published in the Federal Register, 45 FR 52078-80 (a46-a49). As they specifically relate to the action taken herein 20 CFR 404.971 and 972 are highly relevant. Under these rules dismissals by the Appeals Council are limited to requests for review and the Appeals Council has no power whatever to dismiss a request for hearing. Thus, it is patent that the Appeals Council exceeded its authority and committed an *ultra vires* act in so doing.[8] Adding insult to injury, the Appeals Council to further its objective

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[8]As can readily be seen 20 CFR 404.971, adopted Aug. 5, 1980, effected a change from the earlier regulations. The effect of the Amendment was to limit the Appeals Council's power in cases of dismissal to *requests for review* and vest in the ALJ *exclusive* authority to dismiss a request for hearing. See 20 CFR 404.957 (1981) and 20 CFR 404.971 (1981) and compare with 20 CFR 404.947 (1980) and 937 (1980).

In any event had the Appeals Council acted within the constraints of the Appellee's own regulations it could at the very most have attempted to modify the ALJ's decision only in respect of the onset date. Thus, Appellant would have been able under 42 USC 405(g) to challenge such a determination in the District Court as was her right.

(Footnote continued on following page.)

of impermissibly dismissing a part of the request for hearing, found that the prior determination of September 1, 1976 was *res judicata*. This too was contrary to Appellee's regulation (20 CFR 404. 957(c)(1)(1981)) which requires among other things that the later determination be made on the *same facts*—which it was not. See Note 3, ante.

Moreover, a further arrogation of unwarranted authority appears in an attempt to modify the onset date of Appellant's disability. Clearly, since the Appellant requested review of *only* the ALJ's failure to reopen the prior application (TR 7-10; 17-18), consideration of any other question not raised by Appellant proceeds on the Appeals Council's own motion. However, it was improper for the Appeals Council to initiate such review because it was not undertaken within 60 days of the date of the ALJ's decision. See 20 CFR 404.969 (1981) and a20-a22.[9] Furthermore, regardless of how the review is initiated, the Appeals Council was required to mail written notice thereof to all parties "stating the reason for the review and the issues to be considered." 20 CFR 404.973 (1981). Such a requirement is obviously in keeping with the general proposition that the parties have a right to be heard and their arguments considered before final action is taken. Yet, this most elementary requirement was as well ignored by

(Footnote continued.)

As well the Appeals Council even misapplied the doctrine of *res judicata* as set forth in 20 CFR 404.957 (c)(1) which is not only a determination exclusively reserved for the ALJ but which as well requires that the decision proceed on the same facts. Clearly the facts were very much amplified on the second application and presented a comprehensive picture of disability in great contrast to the 1976 application. See note 3 *ante*.

[9]The Office of Hearings and Appeals Manual makes it clear that to timely initiate such review, notice thereof must be dated and mailed within the 60 day period (a56-a57).

Mr. Danziger who specifically sought to deny Mrs. Fishman her retroactive benefits and the right of "Court Review."[10]

Having addressed the foregoing irregularities, we turn to a discussion of their relationship to the due process provision of the Constitution.

First and foremost, by operation of 42 USC 405(g), Mrs. Fishman acquired a statutorily protected right to seek judicial review of an unfavorable, final determination of the Secretary. The Administration's action in this case was such as to intentionally deprive her of that right. Viewed in terms of the Due Process Clause of the Constitution, it can fairly be said that Mrs. Fishman was deprived of the liberty to seek relief in the U.S. District Court from an adverse determination of the Secretary.[11]

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[10]Even if Appellee could successfully argue that the Appeals Council might properly on review consider issues other than those raised by Counsel, its action would be fatally defective due to its failure to give notice and its calculated indifference to justice manifested by its improper foreclosure of the opportunity to seek judicial scrutiny of the final decision.

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[11]This deprivation works irreparable injury to Mrs. Fishman! If on the one hand the Appeals Council chose to fix a later date of onset for the disability than did the ALJ and Appellant sought judicial review it might result in a holding that the ALJ's chosen onset date was correct i.e., supported by substantial evidence and that the Appeals Council's was not. If such were the case, the Appeals Council having in fact acknowledged the ALJ's error in not reopening based upon his finding of a January 1, 1976, onset date would be obligated to reopen the earlier application. On the other hand having conceded the ALJ's error, it could not simply affirm his decision as that would make no sense at all without effecting a reopening. (Implicit in the ALJ's selection of the onset date is a finding of new and material evidence). In any event a mere affirmance would afford the right to judicial review which Mr. Danziger was determined to avoid at all costs. Being thus precariously perched on the horns of a dilemma, a solution was contrived which would veto the right of judicial scrutiny and exonerate Appellee from having to pay additional retroactive benefits. This brain child, however, was born at the expense of compliance with the regulatory scheme.

This Court has noted that "(t)he requirements of the due process clause are, of course, flexible and variable dependent upon the particular situation being examined." (cites omitted). *Hewitt v. Helms,* US , (1983), 103 S. Ct. 864, 872 (1983). Although the Court has expressed reluctance to offer Constitutional protection for "individual mistakes . . . in the day to day administration of our affairs,"[12] it is nevertheless clear that if one is "motivated by a desire to curtail or to penalize the exercise of . . . constitutionally protected rights" a different result would obtain. *Bishop v. Wood,* 426 US 341, 349-50 (1976). We submit that the action taken by Mr. Danziger on behalf of the Appeals Council was of a nature and quality which would trigger due process protection in that it aggressively and in a manner contrary to regulation sought to extinguish statutorily created rights. Once the Congress had created for Appellant's benefit a statutory right to review her case, Appellee owed her nothing less than a scrupulous adherence to regulations having the force of law which were designed to protect her rights.[12A] Indeed, the prime requisite of due process is that process be afforded and where a statutory right has been foreclosed by action taken under color of law, the rules must bind the government as much as the governed. Professor Smolla, in his article, *The Erosion of the Principle That the Government Must Follow Self-Imposed Rules,* 52 Fordham Law Review #4, March, 1984, 472-506, put it this way:

[12]This language was applied to action taken by a state agency in respect of one of its employees and undoubtedly the Court was reluctant to intervene. Nevertheless the instant situation is distinguishable and not only involves intentional action by a Federal Agency but as well a gross violation of its own regulations to the irreparable detriment of a third party for whose benefit they were created.

[12A]Indeed this Court has held that due process requirements apply to Social Security proceedings, *Richardson v. Perales,* 402 US 389, 401-402 (1970), and that the Secretary's regulations are enacted with statutory authority—42 USC 405(a), *id.* at 399-400.

> "The idea that government is free to declare through formal legislative or administrative processes that certain procedures will be followed, and then ignore that declaration, is outrageous to American sensibilities. The outrage emanates from due process in its 'primal sense.' " *Id.* at 497.

Apart from the extirpation of her liberty to seek judicial review, a concession of the ALJ's error in not reopening the prior application based upon his chosen date of onset vested in Mrs. Fishman a prima facie property interest in the benefits which she sought.[13] Viewed in this light, the Agency's transgression in not following its own regulations must be considered as implicating the Due Process Clause, in as much as the "now you see it now you don't" approach taken by Mr. Danziger had the effect of pulling the rug out from under Mrs. Fishman. This sort of regulatory evanescence should not be sanctioned by the Court and augurs strongly for a grant of certiorari. The regulations upon which this case focuses are not merely a device for internal housekeeping of the agency but rather do afford "significant procedural protections" such as to call for this Court's insistence on compliance. See *U.S. v. Caceres,* 440 US 741, 758 (1979), dissent of Justices Marshal and Brennan. As well, the regulations which were breached by the Appeals Council are published in 20 CFR and are ones from which Appellant could reasonably seek guidance and upon which she could rely in pursuing her claim. *Caceres* at 752-3.

Consistent with the foregoing, this Court has long insisted that a Federal rulemaker follow its own rules. See

[13]The attempt at fixing a later onset date is nothing but thinly veiled camouflage for its otherewise *ultra vires* action. Such a finding could not withstand judicial review in light of the evidence contained in the whole record showing a severe and continuous impairment of Appellant's ability to work. In any event Appellant should enjoy the benefit of her right to judicial review on this question. See *U.S. ex rel. Accardi v. Shaugnessy,* 347 US 260, 268 (1954).

for example *Arizona Grocery Co v. Atchison T. & S. F. Ry.*, 284 US 370, 386-7 (1932); *CBS v. U.S.*, 316 US 407, 422 (1942); *U.S. ex rel. Accardi, supra* at 267-8; *Service v. Dulles,* 354 US 363, 372 (1957); *Vitarelli v. Seaton,* 359 US 535, 539-40 (1959); *Yellin v. U.S.*, 374 US 109, 120-1 (1963); *U.S. v. Nixon,* 418 US 683, 695 (1974); *Morton v. Ruiz,* 415 US 199, 235 (1974); *Bridges v. Nixon,* 326 US 135, 152-3 (1945).

This long-standing rule should be applied by the Court in the instant case to the facts presented and the Court should not permit its erosion[14] lest we become a government of men and not laws.

The instant case well illustrates the principle, as departure from the regulatory requisites foreclosed Appellant's sole mode of seeking relief. If the Court elects to deny Mrs. Fishman relief that refusal will speak as loudly as thousands of echos for the final result will be to increment the likelihood of administrative abuse in this area of the claims process. From the Agency's aide, it will appear that it has liberty and license to ignore its own validly enacted regulations which at journey's end will be rendered nugatory through the whimsy and pleasure of administrators.[15]

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[14]See Professor Smolla's excellent article.

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[15]The right to rely upon published principles of conduct is long settled. While there appears to be considerable dispute over whether the principle has roots in constitutional law or administrative law cf *Vitarelli supra* at 547 with *Bridges, supra,* at 152-3 and *U.S. ex rel. Accardi, supra* at 268, this writer does not feel the Principle cannot be embraced by both administrative and constitutional law. See Prof. Smolla's article, *ante* at 476-7. Irrespective of which view prevails, however, adherence must be required.

II.

In repudiating subject matter jurisdiction the Courts below have failed to note the distinction between this case and *Califano v. Sanders (supra).* They have further declined jurisdiction in conflict with their own well-settled precedent and contrary to the precedent cited above.

Both the District Court and Court of Appeals have held that Appellant seeks no more than to review "an abuse of discretion" in refusing to reopen her earlier claim which is unreviewable pursuant to this Court's holding in *Califano v. Sanders, supra* (a1-a8). Moreover, both Courts cited *Latona v. Schweiker,* 707 F 2d 79 (2d Cir. 1983), as further controlling precedent. Yet, careful analysis reveals important distinctions between the instant case and those thought to control. In both *Sanders* and *Latona* the prior administrative decisions made an adjudication of the claimant's rights for the *entire* tenure of his insured status. Thus, with the optional hearing as in *Latona* or without a hearing as in *Sanders,* the *ALJ* examining the claim properly used his regulatory authority to determine if there was a basis to reopen under the grounds specifically set forth in the relevant regulations. *Sanders* at 103 and *Latona* at 81. In the case at bar, Appellee's decision on Mr. Fishman's first application was to the effect that the claim was somewhat premature as Mr. Fishman's disability had not continued for the minimum statutory duration of 12 months (a9-a11, a12-a14; TR 98). As well, Appellee had even invited Appellant to pursue her case further at a future time and had clearly made no determination which encompassed the entire period of her insured status that would expire on June 30, 1981 (TR 113).[16] Thus, her

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[16]The notation DIS*DLI 06-81 toward the bottom of the earnings record shows she was insured through the second quarter of 1981. Earnings posted for 1976 and 1977 represent payments made subsequent to the cessation of work due to sabbatical leave, backpay, and/or other benefits (TR 125).*

subsequent claim filed during 1980 dealt, in addition to reopening the earlier decision, with a period of time subsequent to it for which she remained insured and relative to which no prior final decision had been made. In light of this, we respectfully submit that when Appellant was afforded a hearing for the first time in connection with the latter application it was pursuant to statute (42 U.S.C. 405(b)) rather than being convened solely under Appellee's regulations to determine her right to reopen the prior application. Inasmuch as this was the case, *Sanders* prima facie does not apply (*id.* at 108) and any decision subsequently made would be a "final decision" capable of judicial review. Even apart from this distinction, here unlike *Sanders* and *Latona,* the *ALJ* found her presentation persuasive and did not exercise his right to dismiss any part her request for hearing as *res judicata.* Indeed he even found her disability to commence on the date which she had repeatedly alleged—January 1, 1976. Thus, the action of the Appeals Council here was most dissimilar to that which it took in *Latona* and *Sanders* where it merely approved a valid, discretionary exercise of an ALJ's authority. Contrary to its own regulations it herein seized and arrogated to itself powers which it did not have by partially dismissing the request for hearing. In doing so it violated appellant's right to procedural due process[17] and in light of this the case would appear to fall most squarely into the exception of *Sanders* (at 109)—leaving the door open for review if a challenge to Appellee's action is made on constitutional grounds. Accord: *Latona* at 81.

At least equally as important as the foregoing is this Court's statement in *Sanders* (107-8) that 42 USC 405(g) "cannot be read to authorize judicial review of alleged abuses of agency discretion." However this writer does

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[17]It as well misapplied the doctrine of *res judicata* to effect the dismissal, underscoring the procedural transgression with a substantive one, and thereby adding force to our argument.

not understand these words to imply that agency discretion includes the choice to follow or ignore duly enacted regulations which as this Court noted in *Arizona Grocery, supra,* at 396, "ha(ve) the force of statute". Thus it clearly appears that the Court was directing itself to the Agency's power to choose some option within the constraints of regulations and statutes by which it was bound. However, in the instant case the comfort and protection offered by the shield of *Sanders* was fashioned into a sword by the Hon. David Danziger who filed it to a fine edge and used it to defeat Mrs. Fishman's right to "Court Review" (a39). From this, we hope it will be clearly seen that this is not merely an abuse of discretion, but a flagrant abuse of power which caused a constitutional deprivation.[18]

When such abuses have been patient, the Court of Appeals for the Second Circuit has been quick to afford relief. See c.g. *Smith v. Resor,* 406 F 2d 141, 145 (2d Cir. 1969); *Hammond v. Lenfest,* 398 F 2d 705, 715 (2d Cir. 1968), *City of N. Y., et al., v. Heckler,* 742 F 2d 729, 732-3 and 738-40 (2d Cir. 1984).

Procedural irregularity, contra regulations warranted reinstatement of benefits and direction to evaluate cases anew. The failure of that Court to afford such relief here creates a conflict not only with its decisions but as well with precedent of this Court. For that reason, as well as the erroneous application of *Sanders* hereto the Court should grant certiorari.

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[18]In *Wolff v. McDonnell,* 418 US 539, 558 this Court stated, "The touch stone of due process is protection against arbitrary action of the government." cite omitted.

Conclusion.

Although Appellee may seek to defeat our request for certiorari by attempting to dwarf this case as one of a staggering number handled by the Agency, the issues raised nevertheless stand tall and equal among their peers before this Court.

Flagrant abuses of power should not be countenanced especially when they seek to fashion a shield into a sword. As Mr. Justice Frankfurter aptly put it in *Vitarelli, supra,* at 976:

> "He that takes the procedural sword shall perish with that sword."

For all of the reasons urged herein, Appellant prays that a writ of certiorari will issue.

Respectfully submitted,

MARC L. AMES
Attorney for Petitioner

APPENDIX.

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of October, one thousand nine hundred and eighty-four.

Present:

Honorable Irving R. Kaufman,
Honorable Ralph K. Winter,
Circuit Judges,

Honorable Charles H. Tenney,
District Judge,
sitting by designation.

DOROTHY P. FISHMAN,

Plaintiff-Appellant,

against

MARGARET M. HECKLER, Secretary of Health and Human Services,

Defendant-Appellee.

84-6158

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Fishman claims the district court's determination that it lacked subject matter jurisdiction to review the Secretary's refusal to reopen Fishman's first disability application was improper. Section 205(h) of the Social Security Act limits judicial review of any "decision of the Secretary" to those provisions set forth in Section 205(g). 42 U.S.C. §405(h); *Weinberger v. Salfi,* 422 U.S. 749, 757 (1975). Judicial review under that Section extends to "any final decision of the Secretary made after a hearing." 42 U.S.C. §405(g). The Secretary's refusal to reopen a disability claim is not a reviewable "final decision" within the meaning of Section 205(g) because the opportunity to have a decision reopened was created solely by agency discretion and a hearing is not required. *Califano v. Sanders,* 430 U.S. 99, 108 (1977); *Latona v. Schweiker,* 707 F.2d 79, 81 (2d Cir. 1983). Consequently, the district court's dismissal of Fishman's complaint pursuant to Fed. R. Civ. P. 12(b)(1) was proper.

2. Alternatively, Fishman contends the refusal to reopen her 1976 application confers subject matter jurisdiction because it constituted an abuse of agency discretion and violated her constitutional right to due process of law. Section 205(g) of the Social Security

Act, however, "cannot be read to authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits." *Califano v. Sanders, supra,* 430 U.S. at 108. Moreover, although the presence of a valid constitutional claim confers subject matter jurisdiction on a district court, *see id.* at 109; *Latona v. Schweiker, supra,* 707 F.2d at 81, the incantation of a constitutional claim that is "insubstantial and frivolous" or "made solely for the purpose of obtaining jurisdiction" does not. *Bell v. Hood,* 327 U.S. 678, 682-83 (1946). Fishman has offered no evidence in support of her conclusory statement that her due process rights were violated. *Cf. Holloway v. Schweiker,* 724 F.2d 1102, 1105 (4th Cir. 1984).

3. Fishman's other assertions are equally without merit.

4 . Accordingly, the judgment of the district court is affirmed.

IRVING R. KAUFMAN
RALPH K. WINTER
Circuit Judges,
CHARLES H. TENNEY,
District Judge.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

District Court Opinion, Robert J. Ward, U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Memorandum Decision
82- Civ. 852(RJW)

DOROTHY P. FISHMAN,

Plaintiff,

against

MARGARET M. HECKLER, Secretary of Health and Human Services,

Defendant.

Plaintiff seeks judicial review of a final decision of the Secretary of Health and Human Services ("the Secretary"),[1] pursuant to section 205(g) of the Social Security Act ("the Act") as amended, 42 U.S.C. §405(g). The Secretary found that plaintiff is disabled and entitled to disability insurance benefits commencing in May 1979. However, the Secretary declined to reopen an earlier application in which plaintiff was determined not to be disabled, and held that plaintiff was not eligible for benefits for the period prior to May 1979. The Secretary

[1]Secretary Heckler has been substituted as defendant in this action in place of former Secretary Richard S. Schweiker, pursuant to Rule 25(d)(1), Fed. R. Civ. P.

has moved to dismiss this action pursuant to Rule 12(b)(1), Fed. R. Civ. P., on the ground that this Court is without jurisdiction to review a decision by the Secretary not to reopen a prior application for disability benefits. Plaintiff has cross-moved for judgment on the pleadings pursuant to Rule 12(c), Fed. R. Civ. P. For the reasons hereinafter stated, defendant's motion is granted, plaintiff's cross-motion is denied, and the action is dismissed.

BACKGROUND

Plaintiff filed her first application for disability benefits on June 1, 1976, alleging that she was disabled as of January 1, 1976 by "acute torn cartilage of left knee and pain in right knee." The claim was denied initially, and on reconsideration on December 9, 1976. Although plaintiff's right to an administrative hearing was explained in the notice of reconsideration, plaintiff did not make a request for such a hearing in the six months allowed. The denial of reconsideration thus became the final decision of the Secretary.

Plaintiff filed her second application on May 7, 1980, again alleging disability as of January 1, 1976, due to "injury to left knee followed by traumatic synovitis." After this second application was denied initially and upon reconsideration, plaintiff filed a timely request for an administrative hearing. Such a hearing was held before Administrative Law Judge Robert Schwartz ("the ALJ") on April 8, 1981. The ALJ concluded that plaintiff had been disabled since January 1, 1976, and was entitled to a "period of disability" commening on that date. That ruling, however, entitled plaintiff only to benefits commencing in May 1979. *See infra* p. 3. Consequently, plaintiff had also sought to have the Secretary's adverse determination of December 9, 1976 reopened. The ALJ, however, declined to reopen the 1976 application. The Appeals Council affirmed that refusal to reopen the earlier application on December 21, 1981, although it found the ALJ's

legal analysis to be erroneous. That ruling of the Appeals Council represents the final decision of the Secretary at issue in this action.

DISCUSSION

The Act limits the retroactive disability insurance benefits a claimant may receive to the twelve months immediately preceding the month in which an application is filed. *See* 42 U.S.C. §423(b); *see also* 20 C.F.R. §§404.621, 404.622. By receiving benefits commencing May 1979, plaintiff has therefore received the maximum benefits obtainable pursuant to her second application, which was filed in May 1980.[2] Accordingly, plaintiff's cur-

[2]The Secretary states that plaintiff "has received everything to which she is entitled by virtue of her second application." *See* Defendant's Supplemental Memo. of Law at 5, 6 (Mar. 4, 1983). In support of that contention, the Secretary has proffered a form entitled "Determination of Award," which indicates that plaintiff has received benefits from May 1979 calculated on the basis of a January 1, 1976 onset date. *See* Affidavit of Harold V. Tidwell, exhibit 2 (Feb. 16, 1983). Although that form is dated May 1, 1981, prior to the decision of the Appeals Council, it apparently continues to represent the method by which plaintiff's benefits are being calculated.

Plaintiff, however, fears that the decision of the Appeals Council will adversely affect her award, including benefits she has already received. *See* Plaintiff's Supplemental Memo. of Law at 22-23 (Apr. 29, 1983). The Court must agree with plaintiff that the Appeals Council order of December 1981 is equivocal as to the date of the onset of plaintiff's disability. *See also* Defendant's Supplemental Memo. of Law at 5-6 (Mar. 4, 1983). At present, however, plaintiff continues to receive the maximum benefits obtainable under her second application. Indeed, it appears that she may even be receiving slightly higher benefits than she is entitled to, since by virtue of her first application she has been held not to have been disabled during the period January 1, 1976 to December 9, 1976. In any event, the fact remains that the concerns expressed in plaintiff's memorandum of law dated April 29, 1983 have not yet resulted in any concrete injury. The record as it now stands does not convince the Court that the Secretary will construe the Appeals Council decision in the manner plaintiff fears. In addition, the Secretary's memorandum of law dated March 4, 1983 strongly suggests that the Appeals Council order will not be so construed. *See id.* at 5-6. If plaintiff's present fears later prove to be well founded, plaintiff is free to apply to this Court to have this case reopened.

rent attempt to obtain benefits for the period prior to May 1979 does not represent an appeal of her second application. Rather, it is the Secretary's refusal to reopen the plaintiff's 1976 application that must form the basis of the instant action, because it is only that first application that could entitle plaintiff to additional benefits.

It is well settled, however, that a decision by the Secretary not to reopen a prior final decision is not subject to judicial review. As the Second Circuit Court of Appeals has observed:

> In *Weinberger v. Salfi,* 422 U.S. 749 (1975), the Supreme Court held that section 205(h) [of the Act] precludes judicial review of any "finding of fact or decision of the Secretary" except as provided in section 205(g). 422 U.S. at 757. In *Califano v. Sanders,* 430 U.S. 99 (1976), the Supreme Court further held that the Secretary's refusal to reopen a prior final decision was a "decision of the Secretary" within the meaning of section 205(h), but was not a "final decision of the Secretary made after a hearing" within the meaning of section 205(g). *Salfi* and *Sanders,* when read together, compel the conclusion that, at least in the absence of a constitutional claim, the District Court lacked subject matter jurisdiction over the matters raised in Latona's complaint.

Latona v. Schweiker, 707 F.2d 79, 81 (2d Cir. 1983). In *Latona,* as here, the claimant sought to challenge the Secretary's decision not to reopen an earlier application. Plaintiff's claim in the instant action cannot be relevantly distinguished from Latona's claim,[3] and therefore must be dismissed for lack of subject matter jurisdiction.

CONCLUSION

This Court lacks subject matter jurisdiction over the instant dispute. Accordingly, the Secretary's motion to have the action dismissed pursuant to Rule 12(b)(1), Fed. R. Civ. P., must be granted. Plaintiff's cross-motion for judgment on the pleadings pursuant to Rule 12(c), Fed. R. Civ. P., is denied.

It is so ordered.

Dated: New York, New York
March 27, 1984

ROBERT J. WARD
U.S.D.J.

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[3]The various grounds for distinguishing *Latona* asserted by plaintiff's counsel in his letter of May 26, 1983 are unavailing. In particular, the Court views plaintiff's contention that the Appeals Council's action was "illusory, improper, and evasive," when stripped of conclusory rhetoric, simply as a claim that the Council abused its discretion. As such, it is controlled by the *Latona* case, and by *Califano v. Sanders, supra.*

EDITOR'S NOTE

PAGES a9-thru a-49 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FIRST DISABILITY DENIAL NOTICE DATED SEPTEMBER 1, 1976 TOGETHER WITH UNDERLYING RATIONALE OF THE STATE AGENCY.

Social Security Disability Denial Notice

134

From: DEPARTMENT OF HEALTH EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Date: 09/01/76

DOROTHY FISHMAN
2390 PALISADE AVE
APT 37
BRONX NY 10463

Your Claim Number:
112-16-0274

WE HAVE DETERMINED THAT YOU ARE NOT ENTITLED TO DISABILITY BENEFITS BECAUSE YOU DO NOT MEET THE DISABILITY REQUIREMENT OF THE LAW. IN REACHING THIS DECISION WE CONSIDERED HOW MUCH YOUR CONDITION HAS AFFECTED YOUR ABILITY TO WORK. AFTER CAREFULLY STUDYING THE MEDICAL EVIDENCE IN YOUR CLAIM AND YOUR STATEMENTS, IT HAS BEEN DETERMINED THAT YOUR CONDITION IS NOT EXPECTED TO BE SEVERE FOR A CONTINUOUS PERIOD OF AT LEAST 12 MONTHS. IF YOUR CONDITION DOES NOT IMPROVE AS EXPECTED, YOU SHOULD GET IN TOUCH WITH ANY SOCIAL SECURITY OFFICE.

THE DECISION ON YOUR CLAIM WAS MADE BY THE SOCIAL SECURITY ADMINISTRATION ON THE BASIS OF A DISABILITY DETERMINATION BY AN AGENCY OF THE STATE IN WHICH YOU LIVE. PHYSICIANS AND OTHER TRAINED DISABILITY EVALUATION PERSONNEL IN THE STATE AGENCY PARTICIPATE IN MAKING SUCH DETERMINATIONS.

EXHIBIT E

ENCLOSURE - DHEW (SSA) 10058

If you believe that this determination is not correct, you may request that your case be re-examined. If you want this reconsideration, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. If you have additional evidence, submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.

Important: See other side for information about your claim. Exhibit No. 1

Department of Health, Education, and Welfare
Social Security Administration

C 10463

C7[illegible]

DISABILITY DETERMINATION AND TRANSMITTAL, DATED AUGUST 6, 1976.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

FORM APPROVED
BUDGET BUREAU 72R523.5

DISABILITY DETERMINATION AND TRANSMITTAL

1. FOLDER TO: BDI ☐ SA ☐ DIO ☐
2. DATE APP'D. 06/01/76
3. W/E (If Auxiliary Filing) RSI W/E ☐ DIB W/E ☐
4. SOCIAL SECURITY NUMBER 112-16-0274
5. NAME AND ADDRESS OF CLAIMANT
Dorothy Fishman
2390 Palisade Ave, Apt 3F
Bronx Ny 10463
6. DB 03/27/27
7. SEX M ☐ F ☐
8. RACE W ☐ N ☐ O ☐
9. AOD 01/01/76
10. AT AGE
11. CLAIM FOR: FREEZE ☐ DB ☒ CHILD ☐ DWB ☐
12. FAMILY STATUS: MAR. ☒ SG. ☐ NO. CHILDREN (UNDER 18) none
13. QC REQ. LAST MET ☐ SI.
14. ☐ W/E DOES NOT MEET QC REQ. A. ☐ DIS. BDI REVIEW B. ☐ SINCE LAST DEL.
15. PREV. DENIED OR TERM. ☐
16. NON-DIS. DEV. IN PROGRESS ☐
17. MED. DEV. DEF. ☐
18. S A CODE 330
19. STATE New York NY
20. DISTRICT OFFICE ADDRESS 1292 Broadway New York NY 10033
DO CODE 134
RO CODE 21

FRS REVIEWED & APPROVED FOR TRANSMITTAL
21. DO/BO REPRESENTATIVE J. Koonce
22. DATE OF TRANSMITTAL 06/08/76
23. REMARKS 212-569-6161
TELEPHONE NO.: PRESCRIBED PERIOD: Beginning _____ Ending _____
1976 JUN -7 PM 9:03

PURSUANT TO PROVISIONS OF SEC. 221 OF SOCIAL SECURITY ACT, IT IS DETERMINED THAT THE CLAIMANT:

24. ☐ HAS BEEN UNDER A DISAB. SINCE
25. ☐ WAS UNDER A DISAB. A. DATE FROM B. TO
26. ☐ WAS NOT UNDER A DISAB. ON OR BEFORE (Date)
27. ☐ WAS NOT UNDER A DISAB.
28. CASE OF BLINDNESS AS DEFINED IN SEC. 216(i) A. ☐ NOT UNDER A DISAB. FOR CASH BENE. PURP. B. ☐ UNDER A DISAB. FOR CASH BENE. PURP. SINCE
29. DIAGNOSIS Torn Cartilage of the left knee.
30. MOB CODE 6
31. VOCATIONAL BACKGROUND (Occupation) Teacher - public School
OCC. YEARS 21
EDUC. YEARS 16
32. BASIS FOR DETERMINATION REG-BASIS CODE 13-150.1 LIVING
☐ CONTINUED ON ATTACHED SHEET (Use SSA 834)
(RELEASE INFORMATION UNDER 1.0 BDI/FC)
33. REC. RE-EXAM ☐ NONE ☐ (Date)
34. DISABILITY EXAMINER SA
35. DATE 8/6/76
36. REVIEWING PHYSICIAN SA
37. DATE V.C.
☐ CHILD NOT UNDER A DISABILITY WHICH BEGAN BEFORE AGE 18.
☐ W/E DOES NOT MEET QC REQ. HAS ___ QTRS FOR AOD ENDING ___
☐ DISABILITY ESTABLISHED FROM ___ TO ___
41. REMARKS Denial letter not released by S.A.
☐ VR REFERRAL ☐ PREV. REF.
42. RE-EXAM REQ.
43. DISABILITY EXAMINER
44. DATE
45. DISABILITY EXAMINER
46. DATE
47. ☐ BDI ☐ PC
48. LTR/PAR. NO
49. PRIOR ACT ☐ PD ☐ PI ☐ REVISED
50. BASIS CODE
51. A OR D CODE
52. RETURN CODE R
53. CAT. ☐ W ☐ DIB ☐ OSF ☐ CH ☐ FR
54. SPECIAL CODE ☐ VA ☐ VAD
55. LIST NO. —

FORM SSA-831 (10-73)

all

PARTMENT OF HEALTH, EDUCATION, AND WELFARE
cial Security Administration

CONTINUATION SHEET

FOR DISABILITY DETERMINATION MRS:esm 9

NOTE.---Use this form only when necessary for continuation of rationale of "DISABILITY DETERMINATION" or "CESSATION OR CONTINUANCE OF DISABILITY".

NAME OF DISABLED INDIVIDUAL	NAME OF WAGE EARNER(IF AUXILIARY FILING)	SOCIAL SECURITY NUMBER
Dorothy Fishman		112-16- 0274

A.J. Pisani, M.D.-July 16, 1976.

Medical evidence for this 49 year old college graduate reveals that his impairment is severe at time of adjudication, but it is not expected to last 12 months. Therefore, this claim is denied.

(INITIAL AND DATE)

	DATE		DATE		DATE		DATE
	5/02/76		9.6.76				

RECONSIDERATION DETERMINATION OF DECEMBER 9, 1976 AND UNDERLYING RATIONALE OF STATE AGENCY.

Social Security Notice of Reconsideration

From: Department of Health, Education, and Welfare
Social Security Administration

Date: DEC 9 1976

Dorothy Fishman
2390 Palisade Ave Apt 3F
Bronx NY 10463

Your Claim Number:

112 16 0274

Dear Ms. Fishman:

Upon receipt of your request for reconsideration, we had your claim independently reviewed by a physician and disability examiner in your State agency which works with us in making disability determinations. All the evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. A careful review has been made of this evidence taking into consideration your age, education, training and work experience. We find that the previous determination denying your claim for disability insurance benefits was proper under the law.

To be considered disabled, the person must be unable to perform any substantial gainful work due to a medical condition which has lasted or can be expected to last for a continuous period of at least 12 months. The impairment must be so severe as to prevent the person from working not only in the person's usual occupation but in any other substantial gainful work. This condition must be disabling at a time when the person meets the earnings requirement of the law.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. Read the enclosed leaflet BHA-1 for a full explanation of your right to appeal.

If you have questions about your claim, you should get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this letter with you.

Enclosure:
DHEW BHA-1

DO 134

Department of Health, Education, and Welfare
Social Security Administration

* U.S. Government Printing Office 1976—210-831/184

SSA-L681 (12-75)

DISABILITY DETERMINATION AND TRANSMITTAL, D[illegible]D NOVEMBER 22, 1976.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION

DISABILITY DETERMINATION AND TRANSMITTAL

Form Approved. OMB No. 72R523

1. DESTINATION	2. SA CODE	3. FILING DATE	4. SSN
SA ☒ BDI ☐ CRS ☐ DIO ☐	330		112-16-0274

5. NAME AND ADDRESS OF CLAIMANT
Dorothy Fishman
2390 Palisade Avenue Apt. 3-F
Bronx, NY. 10463

6. WE'S NAME (If CDB or DWB Claim)

7. TYPE CLAIM (Title II)
DIB ☒ FZ ☐ DWB ☐ CDB-R ☐ CDB-D ☐ RD-R ☐ RD-D ☐ RD ☐ P-R ☐ P-D ☐

8. TYPE CLAIM (Title XVI)
DI ☐ DS ☐ DC ☐ BI ☐ BS ☐ BC ☐

9. DATE OF BIRTH	10. PRIOR ACTION	11. REMARKS
3/17/27	☐ PD ☐ PT	Recon Filed 10/29/76 Recon Rec'd by S/A on 11/15/76

12. DISTRICT-BRANCH OFFICE ADDRESS	DO-BO CODE	13. DO-BO REPRESENTATIVE	14. DATE
4292 Broadway New York, NY. 10033	134		

DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

15. CLAIMANT DISABLED
A ☐ DISABILITY BEGAN _____ B. ☐ DISABILITY CEASED _____

16. DIAGNOSIS
S/P [illegible]
[illegible]

17. RE-EXAM
☐ NONE
☐ _____ (Date)

18. CASE OF BLINDNESS AS DEFINED IN SEC. 1614(a)(2)/216(i)
A ☐ NOT DISAB. FOR CASH BENE. PURP. B ☐ DISAB. FOR CASH BENE. PURP. BEG. _____

19. CLAIMANT NOT DISABLED
A ☒ THROUGH DATE OF CURRENT DETERMINATION B. ☐ THROUGH _____ C ☐ BEFORE AGE 22 (CDB Only)

20. VOCATIONAL BACKGROUND	OCC. YRS.	ED. YRS.	21. VR ACTION
[illegible] Elementary	21	16	SC. IN A ☐ SC. OUT B ☒ PREV. REF. C ☐

22. PRO. BASIS CODE	23. MED. LIST. NO.	24. MOB. CODE	25. REVISED DET.	26. LIST NO.
[illegible]		1	☐	

27. RATIONALE
[illegible]

☐ [illegible]

☐ D. PERIOD OF DISABILITY ☐ DISABILITY PERIOD

E. ☐ TERM. _____

☒ NOI ESTABLISHED

32. REVIEW PHYSICIAN-SA
[illegible]

33. DATE
11/22/76

34. REMARKS

RECON AFFIRMED

35. BASIS CODE	36. REV. DET. CODES	37. SSA REPRESENTATIVE	SECTION	38. DATE
	0 — 4			

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social Security Administration

CONTINUATION SHEET FOR DISABILITY DETERMINATION

MS:EEA RCH 5

NOTE.--Use this form only when necessary for continuation of rationale of "DISABILITY DETERMINATION" or "CESSATION OR CONTINUANCE OF DISABILITY".

NAME OF DISABLED INDIVIDUAL	NAME OF WAGE EARNER(IF AUXILIARY FILING)	SOCIAL SECURITY NUMBER
Dorothy Fishman		112-16-0274

Dr. Anthony J. Pisani report of 10/4/76.

The statement of evidence in the determination of 8/76 except as modified herein, is hereby incorporated by reference, but not the inferences, findings or conclusions thereon.

Medical evidence in file reveals that the claimant still has some difficulty due to the limited motion of the left knee joint. This lack of complete extension interferes with her walking at this time. It is not expected though, that this should last for one year from onset date. Therefore, it is felt that although the impairment poses a significant restriction on her walking, which would interfere with her work activity at this time, it should not last a year. Therefore, this claim is denied.

EXHIBIT G

(INITIAL AND DATE)

DISABILITY EXAMINER SA	DATE	REVIEW PHYSICIAN SA	DATE	DISABILITY EXAMINER RCH	DATE	DISABILITY EXAMINER RCH	DATE
Pisani	11/16/76	[illegible]	11-22-76				

INITIAL DETERMINATION OF JUNE 16, 1980 RE: 1980 APPLICATION.

Social Security Disability Denial Notice

10463

From: DEPARTMENT OF HEALTH EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Date: JUNE 16, 1980

DOROTHY P FISHMAN
2390 PALISADE AV
APT 3F
BRONX NY 10463

Claim Number:
112-16-0274 A

WE HAVE DETERMINED THAT YOU ARE NOT ENTITLED TO DISABILITY BENEFITS. IN REACHING THIS DECISION WE CONSIDERED HOW MUCH YOUR CONDITION HAS AFFECTED YOUR ABILITY TO WORK. AFTER CAREFULLY STUDYING YOUR RECORDS, INCLUDING THE MEDICAL EVIDENCE AND YOUR STATEMENTS, AND CONSIDERING YOUR AGE, EDUCATION, TRAINING, AND EXPERIENCE, IT HAS BEEN DETERMINED THAT YOUR CONDITION IS NOT DISABLING WITHIN THE MEANING OF THE LAW. IF YOUR CONDITION SHOULD GET WORSE AND PREVENT YOU FROM DOING ANY SUBSTANTIAL GAINFUL WORK, YOU SHOULD GET IN TOUCH WITH ANY SOCIAL SECURITY OFFICE ABOUT FILING ANOTHER DISABILITY APPLICATION.

YOUR SOCIAL SECURITY RECORD AT THE TIME YOU FILED YOUR APPLICATION SHOWS THAT YOU MEET THE EARNINGS REQUIREMENT FOR DISABILITY PURPOSES UNTIL 06/30/81. ANY ADDITIONAL EARNINGS WHICH MAY BE CREDITED TO YOUR RECORD AFTER THE TIME YOU APPLIED MAY, OF COURSE, EXTEND THIS DATE. (AN EXPLANATION OF THE DISABILITY REQUIREMENT AND THE EARNINGS REQUIREMENT IS GIVEN ON THE BACK OF THIS NOTICE.)

THE DECISION ON YOUR CLAIM WAS MADE BY THE SOCIAL SECURITY ADMINISTRATION ON THE BASIS OF A DISABILITY DETERMINATION BY AN AGENCY OF THE STATE IN WHICH YOU LIVE. PHYSICIANS AND OTHER TRAINED DISABILITY EVALUATION PERSONNEL IN THE STATE AGENCY PARTICIPATE IN MAKING SUCH DETERMINATIONS.

ACCORDING TO YOUR PRESENT EARNINGS RECORD AND THE DATE OF BIRTH YOU GAVE US YOU HAVE ENOUGH CREDIT FOR WORK UNDER SOCIAL SECURITY TO QUALIFY YOU FOR RETIREMENT BENEFITS AT AGE 62.

SEE NEXT PAGE

If you believe that this determination is not correct, you may request that your case be re-examined. If you want this reconsideration, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. If you have additional evidence, submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.

If you do not request reconsideration of your case within the prescribed time period, you still have the right to file another application at any time.

Important: See other side for information about your claim. ▶

C80151

Department of Health, Education, and Welfare
Social Security Administration

Form SSA-L793-C1 (2-79) (Formerly SSA-L793)
Prior editions may be used until supply is exhausted

10463 CONTINUATI 112-16-0274 A 463 C

IN ADDITION YOU ARE NOT ENTITLED TO ANY OTHER BENEFIT BASED ON THE APPLICATION YOU FILED.

Important Information

A person may qualify for Social Security disability insurance benefits only if the person meets both the earnings requirement and the disability requirement of the law. These two requirements are explained below.

The Earnings Requirement

- A person whose disability began before age 24 meets the earnings requirement if social security credits have been earned for 6 calendar quarters (1½ years) of work during the 12 quarter (3-year) period ending with a quarter before age 24 in which the disability exists.

- A person whose disability began between the ages 24 and 31 meets the earnings requirement if social security credits have been earned for work in at least one-half of the calendar quarters in the period beginning with the calendar quarter after age 21 and ending with a quarter before age 31 in which the disability exists.

- A person whose disability began at age 31 or later needs to meet the two provisions of the earnings requirement shown below:

  (1) The person needs credit for 20 calendar quarters (5 years) of work during a 40 quarter period (10 years) ending in or after a quarter in which disability exists.

  (2) The person needs credit for one calendar quarter of work for each year after 1950 (or after reaching age 21, if that is later) up to the year the disability began. In this second instance, the credits do not have to have been earned during the past 10 years.

  A person who does not have credit for the amount of work shown above is not eligible for disability insurance benefits under the Social Security Act.

The Disability Requirement

To be considered disabled, a person must be unable to perform any substantial gainful work due to a medical condition which has lasted or can be expected to last for a continuous period of at least 12 months. The impairment must be so severe as to prevent the person from working not only in the person's usual occupation but in any other substantial gainful work considering age, education, training and work experience.

Other Disability Programs

Definitions of disability are not the same in all government and private disability programs. Government agencies must follow the particular laws which apply to their disability programs. Therefore, a finding by a private organization or another government agency that a person is disabled would not necessarily mean that the person meets the disability requirement of the Social Security Act.

Family Benefits

No benefits may be paid to the wife, husband, or child unless the wage earner or self-employed person is entitled to Social Security disability insurance benefits.

If You Want More Information

If you have questions about your claim, you may get in touch with any Social Security Office. Most questions can be handled by telephone or mail. If you visit a Social Security Office, however, please take this letter with you.

This notice concerns only your Social Security disability application. It is not a decision as to whether Retirement, Survivors, Hospital and Medical Insurance or Supplemental Security Income disability or blindness benefits are payable.

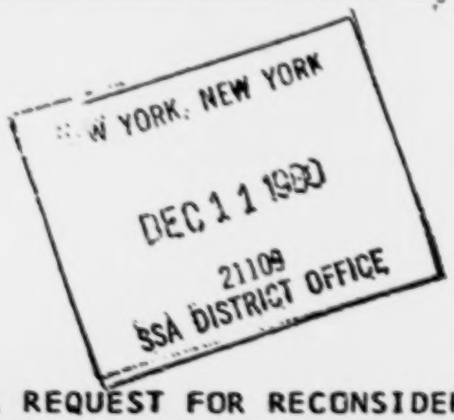
Enclosure:
HEW (SSA) 10058

1980 RECONSIDERATION DETERMINATION DATED NOVEMBER 30, 1980.

Social Security Notice

109
COPY

UNIT DIB



NOV. 30, 1980

DOROTHY P FISHMAN
2390 PALISADE AV
APT 3F
BRONX NY 10463

112-16-0274 HA

UPON RECEIPT OF YOUR REQUEST FOR RECONSIDERATION WE HAD YOUR CLAIM FOR DISABILITY INSURANCE BENEFITS INDEPENDENTLY REVIEWED BY A PHYSICIAN AND DISABILITY EXAMINER IN THE STATE AGENCY WHICH WORKS WITH US IN MAKING DISABILITY DETERMINATIONS. THE EVIDENCE IN YOUR CASE HAS BEEN THOROUGHLY EVALUATED; THIS INCLUDES THE MEDICAL EVIDENCE AND THE ADDITIONAL INFORMATION RECEIVED SINCE THE ORIGINAL DECISION. WE FIND THAT THE PREVIOUS DETERMINATION DENYING YOUR CLAIM WAS PROPER UNDER THE LAW.

TO BE CONSIDERED DISABLED, A PERSON MUST BE UNABLE TO PERFORM ANY SUBSTANTIAL GAINFUL WORK DUE TO A MEDICAL CONDITION WHICH HAS LASTED OR CAN BE EXPECTED TO LAST FOR A CONTINUOUS PERIOD OF AT LEAST 12 MONTHS. THE IMPAIRMENT MUST BE SO SEVERE AS TO PREVENT THE PERSON FROM WORKING NOT ONLY IN THE PERSON'S USUAL OCCUPATION BUT IN ANY OTHER SUBSTANTIAL GAINFUL WORK CONSIDERING AGE, EDUCATION, TRAINING, AND WORK EXPERIENCE. THIS CONDITION MUST BE DISABLING AT A TIME WHEN THE PERSON MEETS THE EARNINGS REQUIREMENT OF THE LAW.

THIS NOTICE CONCERNS ONLY YOUR SOCIAL SECURITY DISABILITY APPLICATION. IT IS NOT A DECISION AS TO WHETHER RETIREMENT, SURVIVORS, HOSPITAL AND MEDICAL INSURANCE, OR SUPPLEMENTAL SECURITY INCOME BENEFITS ARE PAYABLE.

IF YOU BELIEVE THAT THE RECONSIDERATION DETERMINATION IS NOT CORRECT, YOU MAY REQUEST A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE OF THE BUREAU OF HEARINGS AND APPEALS. IF YOU WANT A HEARING, YOU MUST REQUEST IT NOT LATER THAN 60 DAYS FROM THE DATE YOU RECEIVE THIS NOTICE. READ THE ENCLOSED LEAFLET BHA-1 FOR A FULL EXPLANATION OF YOUR RIGHT TO APPEAL.

IF YOU DO NOT REQUEST A HEARING OF YOUR CASE WITHIN THE PRESCRIBED TIME PERIOD, YOU STILL HAVE THE RIGHT TO FILE ANOTHER APPLICATION AT ANY TIME.

IF YOU HAVE QUESTIONS ABOUT YOUR CLAIM, YOU SHOULD GET IN TOUCH WITH ANY SOCIAL SECURITY OFFICE. MOST QUESTIONS CAN BE HANDLED BY TELEPHONE OR MAIL. IF YOU VISIT AN OFFICE, HOWEVER, PLEASE TAKE THIS LETTER WITH YOU.

ENCLOSURE HEW (SSA) 77-10282 BHA-1

ADMINISTRATIVE LAW JUDGE'S DECISION OF APRIL 14, 1981

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

FURTHER ACTION NECESSARY

19

Name and Address of Claimant:
Ms. Dorothy Fishman
2390 Palisade Avenue, Apt #3F
Bronx, NY 10463

NOTICE OF FAVORABLE DECISION
PLEASE READ CAREFULLY

The enclosed decision is favorable to you, either wholly or partly. If you are satisfied with the decision, there is no need for you to do anything at the present time. Further action on the decision will proceed automatically.

If you disagree with the decision, you have the right to request the Appeals Council to review it within 60 days from the date of receipt of the notice of this decision. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone these offices indicating your intent to request review. You may also submit a written request for review directly to the Appeals Council, Office of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

The Appeals Council may, on its own motion, within 60 days from the date shown below, review the decision, which could possibly result in a change in the decision. (20 CFR 404.969 and 416.1469). After the 60 day period, the Appeals Council generally may only reopen and revise the decision on the basis of new and material evidence, or if a clerical error has been made as to the amount of the benefits or where there is an error as to the decision on the face of the evidence on which it is based. (20 CFR 404.988 and 41.6.1488; 42 CFR 405.750 and 405.1570). If the Appeals Council decides to review the enclosed decision on its own motion or to reopen and revise it, you will be notified accordingly.

Unless you timely request review by the Appeals Council or the Council reviews the decision on its own initiative, you may not obtain a court review of your case (section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act).

This notice and enclosed copy of
decision mailed

April 14, 1981

cc:
Name and Address of Representative:
Mr. Marc L. Ames, Esq.
225 Broadway, Suite 3005
NY, NY 10007

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of	Claim for
Dorothy Fishman (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner) (Leave blank if same as above)	112-16-0274 (Social Security Number)

This case is before the administrative law judge upon a timely request for hearing filed by the claimant, who is dissatisfied with the prior determination disallowing an application for a period of disability under section 216(i) (42 U.S.C. 416(i)) and for disability insurance benefits under section 223 (42 U.S.C. 423) of the Social Security Act.

In view of the administrative law judge's conclusion, which is wholly favorable to the claimant, recitation of the evidence is unnecessary.

After careful consideration of all the evidence of record, the administrative law judge finds that the disability earnings requirements are met; and that beginning on January 1, 1976, the claimant was under a "disability" as that term is defined in the Social Security Act, and that such disability has continued up to and through the date of this decision.

It is the decision of the administrative law judge that the claimant, based on the application filed on May 7, 1980, is entitled to a period of disability commencing on January 1, 1976, and to disability insurance benefits, under sections 216(i) and 223, respectively, of the Social Security Act.

Claimant's application to re-open a 1976 application pursuant to Title II of the Social Security Act, as amended is denied.

Robert Schwartz
Administrative Law Judge

Date: April 14, 1981

CLAIM FILE

APPEAL COUNCIL ORDER DATED DECEMBER 21, 1981.

DEPARTMENT OF
Health and Human Services
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

In the case of	Claim for
Dorothy P. Fishman (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner) (Leave blank if same as above)	112-16-0274 (Social Security Number)

This case is before the Appeals Council on the claimant's request for review of the administrative law judge's decision issued on April 14, 1981. The claimant appeals from that portion of said decision that denies the reopening of an earlier application for a period of disability and disability benefits filed on June 1, 1976.

The Appeals Council agrees with counsel that if the evidence submitted in connection with the current application were new and material to the previously adjudicated period, and established a disabling impairment as of the alleged onset date of January 1, 1976, reopening of the prior application would be appropriate. The administrative law judge's basis for his refusal to reopen is erroneous under sections 404.1587, 404.1588 and 404.1589, as cited by counsel. The Appeals Council notes that although counsel was given only 20 days to review the facts, he actually had 6 months to compose his brief on this issue. While the Appeals Council is not necessarily convinced that the totality of the evidence now of record establishes the existence of a disabling impairment prior to April 25, 1980, it is clear that no evidence has been introduced which is new and material as to the claimant's physical impairment during the previously adjudicated period. Indeed, the current evidence submitted by the claimant shows that her knee condition alone is not now, and has not been, for any continuous period of 12 months, totally disabling. Moreover, there is no evidence that her emotional impairment, although apparently related to her traumatic knee injury, required or received any medical treatment during the previously adjudicated period.

Accordingly, there is no basis for reopening the reconsidered determination of December 9, 1976, which became the final decision of the Secretary when the claimant did not request a hearing within the time period specified in the notice of said determination. Thus, the claimant's nondisability through December 9, 1976, is res judicata, and the claimant's request for hearing insofar as it dealt with the previously adjudicated period should have been, and is hereby dismissed.

This action of the Appeals Council will not adversely affect the claimant's date of entitlement, but may affect the amount of her monthly benefits. The appropriate component of the Social Security Administration will advise the claimant in this regard.

Notice of this action is hereby given by mailing a copy to the claimant and the representative.

APPEALS COUNCIL

David G. Danziger, Member

Date: December 21, 1981

Claimant's Name and Address:
Ms. Dorothy P. Fishman
2390 Palisade Avenue, Apartment 3F
Bronx, New York 10463

Representative's Name and Address:
Mr. Marc L. Ames
Attorney at Law
225 Broadway
New York, New York 10007

MISCELLANEOUS PAPERS RELATING TO AGENCY PROCEEDINGS.
INITIAL DISABILITY APPLICATION, 1976.

APPLICATION FOR DISABILITY INSURANCE BENEFITS

Do not write in this space

Wash DC's
SSI 6/1/76
GR

If you are awarded monthly benefits based on this application, you will automatically have hospital and medical insurance protection under Medicare after you have been entitled to social security disability benefits for ~~24~~ consecutive months or at age 65, whichever occurs first.

I hereby apply for a period of disability and/or all insurance benefits payable to me under Title II and Title XVIII of the Social Security Act, as amended.

1. Print your full name (*First name, middle initial, last name*): DOROTHY FISHMAN
   (*Check One*) ☐ Male ☑ Female
   Enter your Social Security number: 112 | 16 | 0274

2. Enter your date of birth (*Month, day, and year*): 3/17/27
   Enter the name of the State or foreign country where you were born: N.Y.

3. (a) Have you (or has someone on your behalf) ever before filed an application for social security benefits, or for a period of disability under social security, or for supplemental security income?
   ☐ Yes (*If "Yes," answer (b), (c), (d), and (e).*)
   ☑ No (*If "No," go on to item 4.*)

   (b) What kind of application did you file (*for example, supplemental security income, social security wife's, widow's, or disability benefits*)?

   (c) Enter name of person on whose social security record you filed other application

   (d) Enter Social Security Number of person named in (c) (*If unknown, so indicate*)

   (e) Are you now receiving benefits on this record? ☐ Yes ☐ No

4. What is your disability? (*Briefly describe your impairment, that is, the injury or illness that prevents, or has prevented, you from working.*)
   acute torn cartilage of left ~~femur~~ knee and pain in right knee

5. (a) When did you become unable to work because of your disability? Date (*Month, day, and year*): 1/1/76

   (b) Are you still disabled?
   ☑ Yes (*If "Yes, go on to item 6.*) ☐ No (*If "No," answer (c).*)

   (c) If you are no longer disabled, enter the date you were again able to work. → Date (*Month, day, and year*)

6. Check any of the following which apply to you:

   (a) ☐ Confined in a medical institution other than a general hospital
   (b) ☐ Patient in a general hospital
   (c) ☐ Confined in bed at home
   (d) ☐ Confined in a chair (*Including wheel chair*)
   (e) ☐ None of the above but unable to go outside
   (f) ☑ Able to go outside but only with help of another person or device
   (g) ☐ Able to go outside without help

AM 6/3

7. (a) Have you EVER filed (or do you intend to file) claim(s) for disability benefits under any workmen's compensation law or plan, or for black lung benefits with Social Security or the Department of Labor?
☐ YES *(If "Yes," answer (b) and (c).)* ☑ NO *(If "No," go on to item 8.)*

(b) Workmen's compensation claim number(s) | Black Lung claim number(s) *(If Black Lung only, go on to item 8.)*

(c) Has there been any decision or any type of payment (e.g., lump sum, partial, total, permanent, temporary, etc.) made on any claim filed?
☐ YES *(If "Yes," go on to item (d).)* ☐ NO *(If "No," go on to item 8.)*

(d) Date of latest decision_____ *(Show month, day and year.)*
☐ Claim Awarded. *(If awarded, go to item (e).)*
☐ Claim Denied. *(If denied, go to item (f).)*

(e) The award was for a
☐ Lump sum payment of $_____ for_____weeks.
☐ Weekly, bi-weekly, or monthly payment *(circle the correct type)* of $_____.

Enter period(s) covered by the above payment(s): _____ *(month, day, and year)* to _____ *(month, day, and year)*

(f) Have you or has someone on your behalf filed an appeal of any decision or payment made?
☐ YES ☐ NO

8. Have you or your spouse worked in the railroad industry any time on or after January 1, 1937?
☐ Yes ☑ No

9. (a) Were you in the active military or naval service after September 7, 1939?
☐ Yes *(If "Yes," answer (b), (c), and (d).)* ☑ No *(If "No," go on to item 10.)*

(b) Enter name of branch *(Army, Navy, etc.)* and country served *(If other than U.S.A.)*

(c) Enter dates of service below:
From: | To:

(d) Have you received, or do you expect to receive, a benefit from any other Federal agency?
☐ Yes *(If "Yes," answer (e).)*
☐ No *(If "No," go on to item 10.)*

(e) Name the other Federal agency(ies).

10. • Enter below the names and addresses of all the persons, companies, or Government agencies for whom you worked during the last 12 months.
• If you worked in agricultural employment, give this information for this year and last year.
If neither of the above applies, write "None" below and go on to item 12.

NAME AND ADDRESS OF EMPLOYER *(If you had more than one employer, please list them in order beginning with your last (most recent) employer)*	WORK BEGAN		WORK ENDED *(If still working show "Not Ended")*	
	Month	Year	Month	Year
NYC Board of Education 110 Livingston St Bklyn	—		12	75
PS 55 - teacher file number		162322		

(If you need more space, use "Remarks" space on the back page.)

11. May the Social Security Administration or the State agency reviewing your case ask your employers for information needed to process your claim? ☑ Yes ☐ No

12. Were you self-employed this year, last year, or the year before?
☐ Yes *(If "Yes," answer item 13.)* ☑ No *(If "No," go on to item 14.)*

13.

CHECK THE YEAR OR YEARS IN WHICH YOU WERE SELF-EMPLOYED	IN WHAT KIND OF TRADE OR BUSINESS WERE YOU SELF-EMPLOYED? *(For example, storekeeper, farmer, physician)*	WERE YOUR NET EARNINGS FROM YOUR TRADE OR BUSINESS $400 OR MORE? *(Check "Yes" or "No")*
☐ This Year		
☐ Last Year		☐ Yes ☐ No
☐ Year Before Last		☐ Yes ☐ No

14. How much were your total earnings last year? *(Count both wages and self-employment income. If none, write "None")* $20,350.00

15. (a) How much have you earned so far this year? *(If none, write "None")* $ None

(b) Did you receive any money from your employer(s) on or after the date in item 5(a) when you became unable to work because of your disability? ☑ Yes ☐ No

(c) Do you expect to receive any additional money from your employer such as sick pay, vacation pay, or other special pay? ☐ Yes ☑ No

If your answer to (b) or (c) is "Yes," please give amounts and explain in "Remarks" on the back page.

16. (a) Check (✓) whether you are:

☑ Married *(Whether living together or separated)* ☐ Widowed ☐ Divorced ☐ Single

(If you checked "MARRIED" or WIDOWED," complete (b) and (c) if appropriate.) *(If you checked "DIVORCED" or "SINGLE" go on to item 18.)*

(b) Enter your wife's maiden name or your husband's name	Date of birth *(If unknown, give age)*	Date of marriage	Date of death *(If deceased)*	Your wife's or your husband's Social Security Number *(If none or unknown, so indicate)*
Milton Zeitlin	1/25/21	8/20/50	—	unknown

(c) If you are a married woman, was your husband receiving at least one-half of his support from you at the time you became unable to work because of your disabling condition, or is he receiving at least one-half of his support from you now? ☐ Yes ☐ No

17. Answer item 17 ONLY if your husband or wife is applying for benefits.

(a) Check (✓) whether your marriage was performed by:

Clergyman or authorized public official ☐, or other ☐ ..... *(Explain)*

(b) Were you married before your present marriage? ☐ Yes ☐ No

(If "Yes," give the following information about each of your previous marriages.)

	To whom married	When *(Month, day, and year)*	Where *(Enter name of city and State)*
Previous marriage			
	How marriage ended	When *(Month, day, and year)*	Where *(Enter name of city and State)*
	To whom married	When *(Month, day, and year)*	Where *(Enter name of city and State)*
Previous marriage			
	How marriage ended	When *(Month, day, and year)*	Where *(Enter name of city and State)*

(Use "Remarks" space on back page for information about any other marriage.)

Your children *(including natural children, adopted children, and stepchildren)* or dependent grandchildren *(including step-grandchildren)* may be eligible for benefits based on your earnings record.

18. (a) Do you have ANY children who are now or were in the past 12 months UNMARRIED and:

	Number of children *(If none, write "None")*
• UNDER AGE 18	
• AGE 18 TO 23 AND ATTENDING SCHOOL	
• DISABLED OR HANDICAPPED (18 or Over and disability began before Age 22)	

If you have children who may qualify for benefits under any of the above conditions, answer (b) and (c).

(b) Full Name of Child	Full Name of Child
	None

(c) Do you wish to apply on behalf of all the children named in (b) for all insurance benefits payable to them under Title II of the Social Security Act, as amended? ☐ Yes ☐ No

If you are not applying for any child you name, enter the child's name under "Remarks" (back page of this form) and explain why you are not applying for such child. You may apply for a child even though you do not wish to be the payee for the child's benefits.

(Over)

19. Do you have a dependent parent who was receiving at least one-half support from you when you became unable to work because of your disability?

☐ Yes ☑ No

20. Do you authorize any physician, hospital, agency, or other organization to disclose to the Social Security Administration or to the State agency that may review this application or your continuing disability, any medical records or other information about your disability?

☑ Yes ☐ No

YOU MUST NOTIFY THE SOCIAL SECURITY ADMINISTRATION PROMPTLY IF:

- Your MEDICAL CONDITION IMPROVES so that you would be able to work, even though you have not yet returned to work.
- You GO TO WORK whether as an employee or a self-employed person.
- You apply for periodic benefits under any workmen's compensation law or plan.
- You are DISCHARGED FROM THE HOSPITAL if you are now hospitalized.

21. Do you agree to notify the Social Security Administration promptly if any of the above events occur?

☑ Yes ☐ No

Remarks: (*This space may be used for explaining any answers to the questions. If additional space is required, attach separate sheet.*)

Received sick pay 46 days ending 3/25/76
a total of 2145.23
My husband is not working full time

IMPORTANT INFORMATION. PLEASE READ CAREFULLY.—A claimant for disability insurance benefits is required to submit medical evidence showing the nature and extent of the disability during the time of the alleged period of disability. If such evidence is not sufficient to arrive at a determination, the claimant may be requested to have an independent medical examination at the expense of the Social Security Administration. Should Social Security obtain information useful to the claimant's physician for treatment, such information may be furnished to the physician.

I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law by fine, imprisonment or both. I affirm that all information I have given in this document is true.

SIGNATURE OF APPLICANT

Date (*Month, day, year*) 6/1/76

Signature (*First name, middle initial, last name*) (*Write in ink*)

SIGN HERE ▶ Dorothy P. Fishman

Telephone Number(s) at which you may be contacted during the day

549-6161

Mailing Address (*Number and street, Apt. No., P.O. Box, or Rural Route*)

2390 Palisade Ave 3F

City and State: Bronx NY

ZIP Code: 10463

Enter Name of County (if any) in which you now live: Bronx

Witnesses are required ONLY if this application has been signed mark (X) above. If signed by mark (X), two witnesses to the signing who know the applicant must sign below, giving their full addresses.

1. Signature of Witness

Address (*Number and street, City, State, and ZIP Code*)

2. Signature of Witness

Address (*Number and street, City, State, and ZIP Code*)

REPORTS OF DR. ANTHONY J. PISANI.

REPORT OF DR. A. J. PISANI, DATED JULY 16, 1976.

Dorothy Fishman 112-16-0274

(Reverse) DF-254

CONFIRMATION OF MEDICAL DATA

I provided the following information by telephone, in connection with the claim for Social Security disability benefits identified on the reverse, to

Dr. Jasmin (Name) on _____ (Date):

I saw the patient for the first time about 3 months ago when she sustained an injury over the left knee. At the end of March 1976, she underwent an operation for a torn cartilage of the left knee. Possibility for ACTIVE & PASSIVE MOTION of the knee was 40 degrees flexion. She has to be readmitted one week from now for manipulation of the knee under general anesthesia. At the present time she can stand only 10 minutes at a time, walk 2 blocks, and cannot climb up stairs too well. However, impairment is not expected to last more than 2 months from now.

In addition, I have attached materials checked below:

- ☐ EKG tracings
- ☐ Report of X-rays
- ☐ Other _____

Physician signature: Dr. Anthony J. Pisani M.D. Date: 7.16.76

Name Typed: ~~A. J. Disani~~ A. J. PISANI M.D.

REPORT OF DR. A.J. PISANI, DATED OCTOBER 4, 1976.

ANTHONY J. PISANI, M.D., P.C.
20 WEST 13TH STREET
NEW YORK, N. Y. 10011
WATKINS 9-1771

October 4, 1976

TO WHOM IT MAY CONCERN

Re: Mrs. Dorothy Fishman
2390 Palisade Avenue
Bronx, New York 10463

This is to advise that Mrs. Dorothy Fishman has been under my care since February 21, 1976 for complaints referred to her left knee. On March 2, 1976 she was admitted to St. Vincent's Hospital and the following day an arthrotomy of the left knee was performed by me, with excision of a torn medial meniscus. Recovery from surgery was uneventful, except for the development of postoperative adhesions in the left knee. In spite of extensive physical therapy treatments, her limitation of motion persisted, so that she was readmitted to St. Vincent's Hospital and on June 12, 1976 a manipulation of the left knee under anaesthesia was performed by me.

Mrs. Fishman was most recently re-examined by me on Octob er 1, 1976, at which time she was still complaining of limited motion of the left knee joint. This lack of complete extension interferes with her walking. X-rays of the left knee taken on October 1, 1976 reveal some atrophy of the patella and femoral condyles.

This patient has been referred to Dr. Mario Stella for his opinion regarding further treatment.

Very truly yours,

Anthony J. Pisani, M.D.

AJP/mw

LETTER OF MARC L. AMES OF APRIL 20, 1981 REQUESTING REVIEW OF ADMINISTRATIVE LAW JUDGE'S DECISION.

Marc L. Ames,
ATTORNEY AT LAW

225 BROADWAY
NEW YORK, N.Y. 10007

WORTH 2-0400

April 20, 1981

Appeals Council
Social Security Administration
Office of Hearings and Appeals
P.O. Box 2518
Washington D.C. 20013

Re: Dorothy Fishman
SS #112-16-0274

Dear Sir or Madam:

Please note we hereby appeal from that portion of the decision of Honorable Robert Schwartz, Administrative Law Judge denying to the claimant a reopening of her earlier application made during the year 1976.

Please note that in connection with the hearing held on April 8, 1981 there was much new material evidence presented as is contemplated by the regulations in connection with reopening a prior application. Further please note that such an application to Judge Schwartz was made on a timely basis inasmuch as Mrs. Fishman's new application wa filed within four years of the prior initial determination.

Additionally, we call to your attention the fact that the Judge ruled that a reopening herein would be impermissible based upon the fact that the claimant failed to go through the hearing stage in connection with the old application. Frankly, we find that the regulations do not contemplate such an approach and indeed it is impermissible to rule that an application may not be reopened on this basis.

In this connection, I hereby request pursuant to the Freedom of Information Act that you furnish me with copies of any and all papers considered in connection with the prior application filed during the year 1976. I further

request that you advise the cost of preparing a transcript of the oral testimony given herein in contemplation of our making further remarks on Mrs. Fishman's behalf. We call to your attention, that we will require sixty days from the time of the receipt of the transcript of testimony in which to offer final comment as aforementioned.

Thanking you for your anticipated attention, courtesy and cooperation, I am

Sincerely yours,

Marc L. Ames

MLA/mmk

P. S. We further request under the Freedom of Information Act a copy of Judge Schwartz's file rationale and a copy of those portions of the OHA Handbook dealing with the reopening of prior applications.

ANALYST'S RECOMMENDATION TO HON. DAVID DANZIGER DATED NOVEMBER 2, 1981.

CASE ANALYSIS DISABILITY UNDER TITLE II AND/OR XVI

AUAT: K. t. Walraven 11/02/81

MEDICAL:

RECOMMENDATION: ☐ REOPENING ☒ GRANT REVIEW ☐ OWN MOTION REVIEW ☐ TIME LIMIT EXPIRES

ACTION RECOMMENED: ☐ REMAND ☐ AC DEVELOPMENT ☒ REVERSE ISE

A MEMBER:

B MEMBER:

TITLE II	TITLE XVI
☒ POD-DIB	☐ SSI DISABILITY (ADULT)
☐ CIB (DISABILITY)	☐ SSI DISABILITY (CHILD)
☐ POD BLINDNESS	☐ SSI BLINDNESS
☐ POD CESSATION	☐ SSI CESSATION

C MEMBER:

IN CASE OF-CLAIMANT ☐ MR. ☒ MRS. ☐ MISS ☐ MS.

DOROTHY P. FISHMAN

SOCIAL SECURITY NUMBER: 112-16-0274

WAGE EARNER (LEAVE BLANK IF SAME AS ABOVE)

REPRESENTATIVE ☒ YES ☐ NO

ATTORNEY ☒ YES ☐ NO

DATE E-R LAST MET (WHERE APPLICABLE): 6/30/81

FULLY INSURED STATUS (WHERE APPLICABLE) ☒ MET CURRENTLY ☐ EXPIRED (SPECIFY DATE)

ALJ: Robert Schwartz

H/O: N.Y. N.Y. (020)

R/R TIMELY FILED (WHERE APPLICABLE) ☐ YES ☐ NO

Basis for Denial by ALJ:

☐ Clmt Engaging in SGA ☐ Clmt can do past relevant work ☐ Denied Under Rule(s) No.

☐ Impairment not severe ☐ Clmt can do other work ☐ Denied Under other (Specify on attached sheet)

ALJ est. Disabil. as of 01/01/76

Alleged Onset Date (AOD): 01/01/76

Date of Birth: 3/17/27

Age at AOD: 48

Alleged Highest Grade Completed: 16

Effective Education Found by ALJ: no finding

Past Relevant Work ☐ Unskilled ☐ Semi-Skilled ☒ Skilled ☐ None

Explain: School teacher.

Primary Limitation(s) ☐ Exertional ☐ Non-exertional ☒ Combined

Diagnoses:

S/P arthrotomy of left knee, involutional melancholia

Expert Testimony ☐ None ☒ Clt's Dr. ☐ MA ☐ VE ☐ Other

Maximum RFC found by ALJ (i.e., type of work):

☐ Sedentary ☐ Light ☒ Medium ☐ Other

Additional Evidence ☐ Yes ☒ No

State and Judicial Circuit: N.Y. 2nd

REASON FOR RECOMMENDED ACTION: (CONTINUE ON A SEPARATE SHEET, IF NECESSARY)

Please see the attached sheets.

(1)

TO:	ROOM	BLDG	INITIAL
1. ~~BF-1~~	301	B	
* 2. ~~SSB~~	~~207~~	~~B~~	DMT 11-20
3. Mr. Danziger - "A" Member	511B	B	
4. "B" Member		B	
△ 5. Mr. Danziger's office	511B	B	
6. Br. 1 (for diary)	301	B	
7.			
8.			
9.			

RE: Dorothy Fishman SSN: 112-16-0274

[X] R/R [ ] PROTEST [ ] REOPENING DATED: 4/28/81

GRANT REVIEW RECOMM: [X] YES [ ] NO

[ ] SSI [X] DIB [ ] DWB [ ] SSI/DIB [ ] SSI/DWB [ ] DIB/DWB [ ] MI [ ] RSI [ ] CDB

FINAL	INTERMEDIATE	OTHER
DECISION [ ] DENIAL	[X] ANALY [ ] REOPEN REC	[ ] MSS REF
[ ] AFF [ ] REV [ ] RMND	[ ] S/A DEV [ ] REHANDLE	[ ] PROFERT
[ ] LF [ ] SF [ ] DISM	[ ] D/O DEV [ ] AC REJ	[X] LETTER/MEMO
[ ] FAV [ ] UNF [ ] P/TRANS	[ ] O/M REC [ ] OTHER	[ ] QUALITY REV
[ ] INFORMAL RETURN	[ ] RFC AMEND DEC	[ ] CONG LETTER
		[ ] OTHER/NAN

DATE FOR OM EXPIRES: —

REMARKS:

* - Please type the handwritten grant review letter & find. Ltr case to Mr. Danziger.

△ - After your NIA, please return file case to this Branch for diary. COUNCIL MAY WISH TO READ THE BOTTOM OF PAGE 3 & PAGE 4 OF MR. AMES' 10/16/81 LETTER.

FROM: R. F. Wahrsen DATE: 11/02/81

PHONE: 58238 (D-1, B-11) ROOM: 308

HA-684 (4-78) 3-5 DEV 11-13

This clmt. filed an SSA-16 on 6/01/76, alleging disability as of 01/01/76, based on an acute torn cartilage of the left knee and pains in the rt. knee. This problem was caused by a tennis injury. This lady was a school teacher from 1954 - 1975. A 7/16/76, report from a t/p states that the impairment was not expected to last more than 2 mos. from the date of the rept. On 3/03/76, an arthrotomy of the left knee was performed & excision of a torn medial meniscus. On 10/01/76, exam. revealed complaints of limited motion in the left knee joint and lack of complete extension which interfered with walking. Some atrophy of the patella & femoral condyles was noted by X-ray. The condition (impairment) was not expected to last one year from the AOD & that was the basis for the initial denial, which was affirmed upon recon. The recon notice was released on 12/09/76, and no RTH was filed.

The current appl. was filed 5/07/80, with the 01/01/76, AOD, & same alleged impairment. D/O observation on 5/08/80, revealed no difficulties.

Exh. 17 indicates HBP, nervous stress and anxiety, and the phy. indicates that a return to work would have a harmful effect upon the clmt's. health (dtd. 4/22/80).

Exh. 18 shows no significant problems; fluct. HBP; no angina; non-specific T-wave changes on EKG; two exams. by a neurologist were WNL's; and she was on no Rx for her nervous condition and the T/P observed no psychosis. This phy. is a Bd.-cert. internist.

A 4/30/80, rept. by the T/P shows that as of 4/25/80, the clmt. has perm. residuals of the left knee and associated pain. The phy. opined that the clmt. is perm. dis. from jobs requiring standing, prolonged sitting, stair climbing & walking. (Exh. 21). This rept. is the first rept. in the record from this T/P since the 10/04/76, rept. that is in the earlier file. (This physician is a Bd.-cert. orth. surgeon.

On 7/25/80, the clmt. was examined by a psychiatrist (Exh. 23). This phy. also states that no neurological deficits have been noted. The clmt. has developed a psychobia that makes her totally incapacitated; suffers from agaraphobia and claustrophobia; her obsession re the knee borders on a delusional state. Her reactions to the knee problem are almost bizarre; & she is in need of continuing psychotherapy.

A psych. CE was performed on 10/23/80, & this report is essentially the same as the aforementioned rept. dtd. 7/31/80. (Exh. 25).

A 3/30/81, rept. by a general surgeon shows

no terribly significant findings in our opinion, regarding the left knee. It is ½" larger in circumference that the R. there was a full range of flexion and extension & the knee joint was stable. A chronic synovitis of the left knee was dxg; with a strong superimposed psychogenic overlay (Exh. 31).

The 4/1981 decision found the clmt. disabled as of the AOD of 01/01/76. The ALJ would not reopen the 6/01/76, appl. (see para. 3 of the memo to the file).

The psych. who treat. at the hearing 1st saw the clmt. on 7/31/80 (Exh. 23) & saw her 4 times, most recently on 02/19/81. No [illegible] psych. tx. at time of hearing. Saw no psych. before he saw her on 6/31/80. Borderline psychosis indicated. The witness states the clmt. meets listing 12.04, but the ALJ's memo shows 12.03. The witness does not state specifically when he thinks that the clmt. first became disabled due to psych. reasons. At the hearing the rep. (page 66 of the transcript) does not seem to be too sure of the onset disability, but the psych. dis., instead.

In our opinion, the earliest we could recommend a finding of disability would be 4/23/80, when Dr. Pisani gave a partial RFC in his narrative that would appear to pre-

clude a full range of even sedentary work (Exh. 21). Since the 7/31/80, psych. rept. reveals a sign. psych. condition, reportedly precipitated by the knee injury. We have, in this regard prepared a 2/R letter for Council's consideration, which is enclosed.

We do not think that we would be successful in finding No disability, but we would not feel comfortable re-opening the earlier appl. + initial deter., which is what the rep. wishes to happen, unless Council so suggests.

PROPOSED ORDER PURSUANT TO ANALYST'S RECOMMENDATION.

DEPARTMENT OF HEALTH & HUMAN SERVICES — Social Security Administration

Refer to:
SGLAI
112-16-0274

Office of Hearings and Appeals
PO Box 2518
Washington DC 20013

Mr. Marc L. Ames
Attorney at Law
225 Broadway
New York, New York 10007

Dear Mr. Ames:

Re: Ms. Dorothy Fishman, 2390 Palisade Avenue, Apartment 3F
Bronx, New York 10463

The Appeals Council hereby grants the request for review of the hearing decision on this claim.

The administrative law judge found that Ms. Fishman was entitled to a period of disability commencing January 1, 1976. However, after carefully considering the evidence of record, including the material pertinent to the application filed on June 1, 1976, the Appeals Council proposes to issue a decision finding that Ms. Fishman first became disabled, within the meaning of the Social Security Act, on April 25, 1980, when Dr. Anthony J. Pisani indicated that Ms. Fishman's permanent residuals of the knee injury would preclude standing, prolonged sitting, stair climbing and walking (Exhibit 21). Further, the Council believes that the totality of the medical evidence that precedes Dr. Pisani's report of April 30, 1980, does not demonstrate an incapacity for all substantial gainful activity by Ms. Fishman for any consecutive 12-month period prior to April 25, 1980. Although Dr. Pisani's April 30, 1980, report contains no clinical, laboratory or X-ray findings in support of the opinion of total disability, the Council believes that in view of significant psychiatric findings shown in Dr. Yehuda Nir's July 31, 1980, report (Exhibit 23) and later evidence of a continuing psychiatric condition, it is reasonable to conclude that the combination of conditions had reached a degree of severity as of April 25, 1980, so as to have rendered Ms. Fishman incapable of any sustained work activity commencing at that time.

This would mean that disability insurance benefits would be payable for the months beginning with October 1980, the first month following the required waiting period of 5 full calendar months.

You may submit other evidence or a further written statement as to the facts and law in this case. Anything additional should be submitted by mail to the Appeals Council within 20 days from the date of this letter, or the Council should be informed within that time when the material may be expected. Any additional evidence or statement should relate to the question of whether Ms. Fishman became disabled before April 25, 1980.

You may request an appearance before the Appeals Council to present oral argument. A request will be granted where the Council determines that a significant question of law or policy is presented or where the Council is of the opinion that such oral argument would be beneficial in rendering a proper decision in this case. Any request for an appearance should be submitted in writing within 20 days from the date of this letter and should include the reasons for the request. If such a request is submitted, and the Council decides to grant it, you will be notified of the time and place of such appearance.

Instead of the above, you may within the 20 days request that an administrative law judge consider any rebuttal or other evidence, including testimony, you wish to submit and any oral argument you wish to make in support of the claim.

If the Appeals Council does not hear from you within the 20-day period, it will assume that you do not want to request an appearance before the Council or further consideration by an administrative law judge, that you do not want to submit anything additional, and that you concur with the action proposed. The Council will then issue its decision.

Sincerely yours,

Member, Appeals Council

Member, Appeals Council

Enclosure:
Self-addressed envelope

cc:
Ms. Dorothy Fishman

HANDWRITTEN MEMORANDUM OF HON. DAVID DANZIGER IN RESPONSE TO ANALYST'S RECOMMENDATION.

M. Walraven BCT #2-308

Your proposed action is sound but it is not practical under the circumstances. The claimant has already been paid retroactively to 1979 and if we turn that into an overpayment we would have to waive recovery anyway because of operation of Law 404.5709 and 404.512(4). The AC action would be appealable to Court. We can send a denial letter without Court Rights pursuant to SSR 77-28.

[redacted] – but that would be contrary to AC policy in this case.

However, what I want to do is issue an order

of the Appeals Council — but subject
to Court Review holding
that the Appe C. Appeals Council
that if the evidence currently submitted
were new and material to the
previously adjudicated period so that
establishment of the original ACD were
justified reopening of the prior application
would be appropriate. The AC's basis
for refusal to reopen is erroneous under
Yo'r. 1981, '104.1988, and Yo'r. 1984 as
cited by Counsel. The AC notes that although
Council was given only 10 days to review
the facts, he actually had 6 months to
prepare his brief on this issue.

While the AC is not necessarily
convinced that the evidence now of
record establishes the existence
of a disabling impairment prior to 9/25/80,
~~it did not address the new evidence to that~~
it is clear
that no evidence has been introduced
which is new and material as to the claimant's
physical impairment during the previously

adjudicated period. Indeed the CE ~~et~~
evidence submitted by claimant shows
that ~~[illegible]~~ her knee condition
alone is not now (for any continuous period of time)
totally disabling. Moreover, there is
no evidence that her industrial impairment,
although apparently related to her traumatic
knee injury, required or received
any medical treatment during the
previously adjudicated period.

Accordingly, ~~[illegible]~~ there
is no basis for reopening
reconsideration determination of 9/1/76
which became the final decision of
the Secretary when claimant did not request
a hearing. Thus the claimant's
non-disability through 9/1/76 is
res judicata, and the claimant's request
for hearing insofar as it dealt with
the previously adjudicated period should
have been, and is hereby dismissed.
This action of the AC will not adversely affect
claimant's date of entitlement, but will affect the amount
of her monthly benefits. The appropriate component
will advise clmt. in this regard.

CERTIFICATE OF AWARD.

Social Security Award Certificate

From: Department of Health, Education, and Welfare
Social Security Administration

Date 6/11/81

DOROTHY P FISHMAN
2390 PALISADE AVE
APT 5F
BRONX NY 10463

Claim Number: 112-16-0274 HA

Type of Benefit	Date of Entitlement	Monthly Benefit
DISABILITY	05/79	$428.50
	06/79	$471.00
	06/80	$538.40

SHORTLY AFTER 05/15/81 YOU WILL RECEIVE A PAYMENT FOR $8992.58 WHICH REPRESENTS ALL BENEFITS DUE YOU THROUGH 06/81. THEREAFTER, A CHECK FOR $528.80 WILL BE SENT TO YOU EACH MONTH.

YOUR HOSPITAL AND MEDICAL INSURANCE COVERAGE UNDER TITLE XVIII OF THE SOCIAL SECURITY ACT BEGINS 05/81.

A MONTHLY PREMIUM IS REQUIRED TO KEEP YOUR MEDICAL INSURANCE PROTECTION. YOUR PREMIUM AMOUNT(S) AND EFFECTIVE DATE(S) ARE LISTED BELOW-

$ 9.60 05/81

THIS NOTICE MAY BE USED IF MEDICARE SERVICES ARE NEEDED BEFORE YOU RECEIVE YOUR HEALTH INSURANCE CARD. YOU SHOULD RECEIVE YOUR CARD WITHIN 4 WEEKS.

IF YOU DO NOT WANT MEDICAL INSURANCE, COMPLETE THE ENCLOSED CARD AND RETURN IT TO US IN THE POSTAGE-FREE ENVELOPE BY THE DATE SHOWN ON THE CARD. IF YOU DECIDE TO DECLINE COVERAGE, ANY PREMIUMS PAID OR DEDUCTED WILL BE REFUNDED.

THE PAYMENT YOU WILL RECEIVE SHORTLY AFTER 05/15/81 WILL BE ADJUSTED BY $ 9.60 FOR ALL MEDICAL INSURANCE PREMIUMS DUE THROUGH 05/81. MEDICAL INSURANCE PREMIUMS WILL BE DEDUCTED ONE MONTH IN ADVANCE.

THE CHANGE IN BENEFIT RATES IS DUE TO AMENDMENTS TO THE SOCIAL SECURITY ACT.

1 ENCLOSURE: SSA 2690 ENVELOPE / SSA-10153
SEE NEXT PAGE

This certifies that you (or the person(s) on whose behalf you applied), became entitled under the Social Security Act to the social security benefits shown.

Stanford G. Ross
Commissioner of Social Security

WE ARE SENDING A COPY OF THIS NOTICE TO YOUR ATTORNEY.

YOU ARE NOT ELIGIBLE FOR ANY TYPE OF BENEFIT OTHER THAN WHAT IS STATED ON THIS CERTIFICATE. ENTITLEMENT TO ANOTHER BENEFIT ON THIS OR ANY OTHER RECORD IN THE FUTURE REQUIRES A SEPARATE APPLICATION.

THIS ACTION SUPERSEDES OUR PREVIOUS DETERMINATION AND IS IN ACCORDANCE WITH THE DECISION OF THE ADMINISTRATIVE LAW JUDGE. YOU HAVE ALREADY BEEN NOTIFIED OF YOUR APPEAL RIGHTS REGARDING THE DECISION MADE BY THE ADMINISTRATIVE LAW JUDGE AND WHAT YOU MUST DO TO HAVE THAT DECISION REEXAMINED. IF YOU BELIEVE THAT ANY OTHER DETERMINATION MADE BY US CARRYING OUT THE ADMINISTRATIVE LAW JUDGE DECISION IS INCORRECT, YOU MAY REQUEST THAT PART OF YOUR CASE BE REEXAMINED. IF YOU WANT THIS RECONSIDERATION, YOU MUST REQUEST IT NOT LATER THAN 60 DAYS FROM THE DATE YOU RECEIVE THIS NOTICE. YOU MAY MAKE ANY SUCH REQUEST THROUGH ANY SOCIAL SECURITY OFFICE. IF ADDITIONAL EVIDENCE IS AVAILABLE, YOU SHOULD SUBMIT IT WITH YOUR REQUEST.

CC:
ROBERT SCHWARTZ
ADMINISTRATIVE LAW JUDGE
39 BROADWAY 15TH FLOOR
NEW YORK NY 10006

CC:
MARC A AMES
ATTORNEY AT LAW
225 BROADWAY SUITE 3005
NEW YORK NY 1007

Constitutional Provision Involved.

AMENDMENT 5

[Criminal actions—Provisions concerning—Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 USCS § 423

(d) Definition of disability. (1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

42 USC 405

(g) Judicial review.

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. . . .

42 USC § 405.

Evidence and procedure for establishment of benefits.

(a) Rules and regulations. The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(b) Administrative determinations and hearings. The Secretary is directed to make findings of act, and decisions as to the rights of any individual applying for a payment under this title . . . he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision.

FEDERAL REGISTER PAGES OF AUGUST 5, 1980 SETTING FORTH REGULATORY AMENDMENTS.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Parts 404 and 416

Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: These final regulations reorganize and restate in simpler language the rules on determinations, administrative review, the representation of parties under titles II and XVI of the Social Security Act, and payment procedures under title II. These are the rules on (1) initial determinations; (2) the administrative review process, including reconsideration, hearing, and Appeals Council review; (3) the reopening and revision of final determinations or decisions; (4) the representation of a person by someone else in dealings with us; and (5) payment procedures for title II.

We have rewritten and reorganized the existing regulations to make them clearer and easier for the public to use. Although no substantive changes have been made in the existing regulations, several provisions have been added to reflect current practice and several provisions have been clarified.

The Notice of Proposed Rule Making (NPRM) was published in the Federal Register on April 4, 1979 (44 FR 20176) with a 60-day comment period.

DATES: These amendments are effective August 5, 1980.

FOR FURTHER INFORMATION CONTACT: Cliff Terry, Legal Assistant, Room 4234, West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone (301) 594–7519.

SUPPLEMENTARY INFORMATION: These regulations are being revised and reorganized as part of HEW's Operation Common Sense, which is a Department-wide effort to review, simplify, and improve HEW's regulations. The regulations presented here carry out sections 205, 206, 207, 1102, 1631(c), and 1631(d)(2) of the Social Security Act.

Determinations, the Administrative Review Process, and Reopenings

The regulations on determinations, the administrative review process, and reopenings of claims under titles II and XVI describe (1) initial determinations; (2) the procedures that must be followed and the conditions that must be met to have a reconsideration, hearing, Appeals Council review, or judicial review; and (3) the conditions under which a determination or decision may be reopened and revised. These rules are substantially the same under both programs.

Representation of Parties

The regulations on the representation of parties in proceedings under titles II and XVI of the Social Security Act concern the right of a person to appoint a representative to deal with us, the role of a representative, fees payable to a representative, and the conduct of a representative.

Title II Payment Procedures

The regulations on title II payment procedures explain how we certify title II benefit payments after making a favorable determination, how in certain cases we expedite the payment of benefits, when we may make joint payments to members of a family, when we may delay certifying payments, and what our policy is on the assignment or transfer of benefit payments.

Changes Made by the Final Rules

1. To clarify when a decision may not be reviewed by a Federal district court, the new regulations state that if the Appeals Council dismisses a request for administrative review, the action is binding on the parties and not subject to further review. The effect of a dismissal and the circumstances under which a dismissal may occur are explained in §§ 404.971, 404.972, 416.1471 and 416.1472.

2. The time period for filing briefs or other written statements about your case with the Appeals Council has been increased from 10 to 20 days. This change is reflected in §§ 404.977 and 416.1477.

3. We changed the title II regulation that states when a determination or a decision on a revision of an earnings record may be reopened. Section 404.990 changes the time period for requesting reopening from 6 months to 60 days. This change conforms the time period to the other time periods for requesting administrative review.

4. The provisions of Subpart J of Part 404 that govern the procedures for determining and reviewing whether a person meets the requirements for entitlement to hospital insurance benefits and supplementary medical insurance benefits as described in 42 CFR Part 405 were removed from the regulations. Although the provisions are removed, they are not repealed and will continue to apply to the Health Care Financing Administration (HCFA) until new regulations are published by HCFA.

5. We rewrote the rules on the representation of parties in proceedings under title II that were in Subpart J of Part 404 and moved them to a new Subpart R. This makes these rules easier to locate and gives them the same organization as the corresponding rules on the representation of parties under title XVI which are located in Subpart O of Part 416.

6. The provisions of Subpart J that govern the representation of parties in matters concerning entitlement to hospital insurance benefits and supplementary medical insurance benefits were removed from the new Subpart R. Although the provisions are removed, they are not terminated and will continue to apply until new regulations are published by the Health Care Financing Administration.

7. The only change in the rules governing the representation of parties is the addition of the requirement that a person submit to us a written notice that an attorney has been appointed as his or her representative. Under the prior regulations, written notice was required only if the representative was not an attorney. The change is made to reflect our current practice and to assure that we have the name and address of any person designated to act as a representative. The purpose of this requirement is to protect confidential personal information from unauthorized disclosure, while facilitating its release to designated representatives. These requirements are stated in §§ 404.1707 and 416.1507.

8. We rewrote the title II payment procedures that were in Subpart J of Part 404 and placed them in a new Subpart S. A new provision was added to reflect a change in the law that subjects title II benefit payments to process brought to enforce a child support or alimony obligation.

Response to Public Comments

In response to the Notice of Proposed Rule Making we received 35 comments, 20 from legal aid organizations, 13 from administrative law judges, and two from other members of the public. Since our objective in this recodification is to clarify, by simpler language and improved organization, the existing regulatory provisions so that they will be more easily understood by members of the public, the comments we received were very useful in preparing the final version of the regulations. Several revisions, discussed below, were made as a result of these comments.

Discussion of Public Comments

Changes We Made

As the result of the public comments we received, we have made the following revisions in the final regulations.

1. *Examples of good cause for late filing.* A commenter noted that proposed §§ 404.909(b)(3) and 416.1409(b)(3) omitted one of the examples, which was in the prior regulations, of circumstances where there was good cause for missing the deadline to request review. The example was omitted because we did not believe that it was necessary to list all of the examples that had been in the prior regulations. As the commenter found the longer list of examples helpful, we have inserted the omitted example as paragraph (b)(9) of §§ 404.911 and 416.1411 of the final regulations.

2. *Reconsideration determinations.* A commenter indicated that in a reconsidered determination, we should give "specific reasons" for the determination. Proposed §§ 404.917 and 416.1417 relating to the notice of a reconsidered determination, stated that the "reasons" for the determination would be given. This change in language did not reflect any change in policy. To make that clear, we have reinserted the adjective "specific" in these sections of the final regulations relating to the notice of a reconsidered determination. In the final regulations these sections are numbered §§ 404.921 and 416.1421.

3. *Hearing procedures.* Several commenters suggested that we should include in the regulations specific statements requiring an administrative law judge to inquire fully into the matters at issue and to follow procedures at the hearing which will afford the parties a reasonable opportunity for a fair hearing. The commenters were concerned that, by not including these specific statements, the recodification reflected a change in the hearing requirements. This was not our intention. Neither the proposed nor the final rules lessen in any way the responsibility of an administrative law judge to give claimants a fair hearing. In the final regulations, we have rewritten proposed §§ 404.935 and 416.1435 to provide a more detailed statement of the general hearing procedure. In the final regulations, these sections are numbered 404.944 and 416.1444.

4. *Extension of time to request judicial review.* Several commenters noted that the proposed regulations omitted the provision in the prior regulations which indicated when we would permit an extension of time for filing an action in a Federal district court. We agree that such a provision should be included in the final regulations. Accordingly, we have added §§ 404.982 and 416.1482.

5. *Authority of a representative.* Commenters indicated that a claimant's representative should be permitted to assist the claimant in filing an application. We agree and that is SSA's present policy. Sections 404.1710(b) and 416.1510(b) have been revised in the final regulations to make this clear and also to make clear that a representative may not sign an application on behalf of the claimant unless authorized to do so under the rules governing the filing of applications in §§ 404.612 or 416.315.

6. *Notices to representatives.* Many commenters asked that we state in the regulations that notices of determinations and decisions will be mailed to an authorized representative, if there is one, as well as to the claimant of title II or title XVI benefits. Present policy, which has not changed, is to send a copy of title II and title XVI determinations and decisions to authorized and designated representatives. Before this recodification, this policy was reflected in three sections of the title XVI regulations (§§ 416.1404, 416.1483 and 416.1515) and one section of the title II regulations (§ 404.973). In the NPRM, we stated the policy in proposed §§ 404.1715 and 416.1515. In the final regulations, we have revised these two sections to make the policy clear.

Changes We Did Not Make

For the reasons stated below, we did not agree that the final regulations should be revised to include other changes suggested by commenters, and we did not adopt the following suggestions.

1. *Eliminate reconsideration.* A commenter recommended that we should eliminate reconsideration as a step in the administrative review process. The commenter believes that too few initial determinations are changed at the reconsideration level to justify requiring claimants to go through reconsideration before they can have a hearing. We require reconsideration as a necessary step to a hearing because we are convinced it is advantageous to the claimant and makes the administrative appeals process more effective. If the initial determination is upheld on reconsideration, the person is given a more detailed explanation of the determination than was provided in the initial denial letter. If a person has any doubt as to whether his or her claim was considered fairly in the first instance, that doubt is often removed upon reconsideration. If in any case the person is not satisfied with the reconsidered determination, a hearing may be requested. Because the written reconsideration determination states the issues in dispute, our findings of fact, the provisions of the law which apply, and our conclusions, the claimant is fully advised of the reasons why SSA adjudicated the claim as it did. In those cases where the claimant continues to be dissatisfied, the reconsideration determination clearly facilitates the hearing process. For these reasons, we continue to believe that reconsideration is an essential step in the process of administrative review.

2. *Change the expedited appeals process.* One commenter recommended that the expedited appeals process be eliminated, and several commenters recommended that it be available when the legal validity of a regulation—as well as the constitutionality of a statute—was challenged. Under existing law, a person may seek judicial review only if he or she has received an adverse initial determination and has exhausted his or her rights to administrative review. Administrative review includes reconsideration, hearing and Appeals Council review. In cases where the only issue in dispute is the constitutionality of a statutory provision, exhaustion of the rights to adminstrative review is futile for the claimant. In that situation, the expedited appeals process is available. We have found it to be helpful and time-saving. However, in instances where issues other than the constitutionality of a statute may be in dispute, the exhaustion of administrative remedies serves a clearly useful purpose, since it avoids time-consuming and often expensive judicial intervention in cases where the agency has authority to address the claimant's complaint. Further, we do not believe the Social Security Act would authorize us to extend the expedited appeals process to other situations. Thus, the exhaustion of administrative remedies remains a requirement for judicial review.

3. *Provide assistance for hearing-impaired claimants.* A commenter recommended that we include in the regulations a requirement that we provide a certified sign language interpreter for any hearing-impaired person who has requested a hearing. Administrative law judges now have the authority to secure assistance for hearing-impaired claimants. We do not believe it is necessary to include in the regulations procedures for requesting such assistance.

4. *Include the list of exhibits with a hearing decision.* Several commenters recommended that we state in the regulations that a list of documents

presented as exhibits at a hearing will be included as a part of the hearing decision. A list of the documents presented as exhibits is included as part of the hearing decision. We do not believe that it is necessary to include this as a regulatory provision.

5. *Permit a representative to appeal on behalf of a claimant even though we have not received his or her written notice of appointment.* Several commenters recommended that we change §§ 404.1707(a) and 416.1507(a) to provide that a representative who has not yet sent us written notice of his or her appointment may still appeal on behalf of a claimant, as long as we get a later written notice of the appointment. The commenter believed this change would keep some appeals from being dismissed because they were not timely filed. The recommended change in the regulations is unnecessary because they do not require that we receive a written notice of appointment before an appeal is effective. We have, however, changed §§ 404.1707 and 416.1507 to make clear that either the claimant or the representative may file the notice of appointment.

6. *Transcription of hearing records.* Several commenters thought that the proposed regulations governing the preparation of a hearing transcript (proposed §§ 404.940 and 416.1440) represented a change in policy in that we would no longer prepare a typed copy of a hearing transcript if judicial review was not timely sought or if we asked the court to remand a case to us for further consideration. In the proposed rules, we stated our general policy and two exceptions. The general policy is that we prepare a transcript whenever a civil action is filed against us. As to the first exception, we do not prepare a transcript when a civil action is not timely filed, unless we find that there was good cause for the late filing. The reason is that in those circumstances the case should be dismissed, and it is not necessary to have a transcript of the hearing record for purposes of the dismissal. The second exception applies in certain situations when we ask the court to remand the case to us for further consideration. If we request a remand, a transcript is not prepared. This should clarify the policy and the two exceptions, which are restated in §§ 404.951 and 416.1451 of the final regulations.

7. *Provide time limits for issuing determinations and decisions on benefit claims.* In proposed § 416.1442, changed to § 416.1453 in the final regulations, which governs the administrative review of claims for supplemental security income benefits, there is a time limit for the issuance of hearing decisions on non-disability issues. Several commenters recommended that we establish a similar time limit for the issuance of determinations and decisions involving other benefit claims. We have not included such a provision here because both the Congress and SSA are currently considering mandating time limits in the administrative review process. Indeed, we have already published a notice of proposed rulemaking (45 FR 12837–12844, February 27, 1980), proposing time limits for holding hearings, for issuing hearing decisions, and for Appeals Council actions, in both title II and title XVI cases. This will give members of the public an opportunity to comment upon the proposal before it becomes final.

8. *Withhold attorney fees from past-due title XVI benefits.* Several commenters recommended that we withhold past-due title XVI benefits, as we do past-due title II benefits, for direct payment to an attorney who has represented a claimant. We have no statutory authority to withhold title XVI benefits for that purpose.

9. *Improve our notices.* Several commenters suggested that the regulations require that our notices meet certain standards for specificity and clarity. We agree that they should. Moreover, several steps have already been taken toward that end, and more will be done. However, we would prefer at this time deferring the regulatory changes suggested by the commenters.

Other Changes

In addition to the changes we made as a result of the public comments, we made several other changes in the final regulations to reflect policy and procedures that are in effect under present regulations. These changes are as follows.

1. Proposed §§ 404.930 and 416.1430 were revised to clarify that, with very limited exceptions, hearings are not held outside the United States. The exceptions for title II claims are American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. With respect to title XVI claims, the exception is the Northern Mariana Islands. See, §§ 404.936 and 416.1436 of the final regulations.

2. Proposed §§ 404.959 and 416.1459 were revised to clarify when a case will be remanded by the Appeals Council to an administrative law judge and the procedures that are followed when there is a remand. See, §§ 404.977 and 416.1477 of the final regulations. Proposed §§ 404.960 and 416.1460 were revised to clarify the procedures that are followed when a case is remanded by a Federal court to the Appeals Council for further consideration. See, §§ 404.983 and 416.1483 of the final regulations.

3. Proposed §§ 404.968 and 416.1468 were revised to make clear that when a hearing decision is revised, the revision may be reviewed by the Appeals Council; or if the revision is based on evidence that was not in the hearing record, any party to the revised decision may request a hearing. See, §§ 404.992 and 416.1492 of the final regulations.

4. For reasons of clarity and consistency, we made a number of editorial changes. Also, we made several changes to reflect the January 1979 reorganization of SSA.

Change not Included in These Regulations

Pre-Recoupment Personal Conferences in Title II Overpayment Cases

On June 20, 1979 the Supreme Court *Califano* v. *Yamasaki* decided that a person who receives an overpayment of title II benefits and requests waiver of the overpayment must be given the opportunity to have a personal conference on the request before we take any action to recover the overpayment. The Court's decision rests on section 204(b) of the Social Security Act which states that when a title II overpayment occurs, we shall not reduce future benefits, or otherwise recover an overpayment, from any person who is without fault in causing the overpayment, if such adjustment or recovery would either defeat the purpose of title II or be against equity and good conscience. Provisions reflecting the Court's decision have not been included in this recodification because we intend to publish those regulations separately with a notice of proposed rulemaking (NPRM). The NPRM will give members of the public an opportunity to comment on these regulations before they become final.

The proposed regulations with these changes are adopted as set forth below.

(Catalog of Federal Domestic Assistance Program Nos. 13.802 Social Security—Disability Insurance; 13.803 Social Security—Retirement Insurance; 13.804 Social Security—Special Benefits for Persons Aged 72 and Over; 13.805 Social Security—Survivors' Insurance)

was not filed within the stated time period. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 404.911.

§ 404.969 Appeals Council initiates review.

Anytime within 60 days after the date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken. If the Appeals Council does review the hearing decision or dismissal, notice of the action will be mailed to all parties at their last known address.

§ 404.970 Cases the Appeals Council will review.

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue that may affect the general public interest.

(b) If new and material evidence is submitted with the request for review, the Appeals Council shall evaluate the entire record. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently in the record.

§ 404.971 Dismissal by Appeals Council.

The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended. The Appeals Council may also dismiss any proceedings before it if—

(a) You and any other party to the proceedings files a written request for dismissal; or

(b) You or any other party to the proceedings dies and the record clearly shows that dismissal will not adversely affect any other person who wishes to continue the action.

§ 404.972 Effect of dismissal of request for Appeals Council review.

The dismissal of a request for Appeals Council review is binding and not subject to further review.

§ 404.973 Notice of Appeals Council review.

When the Appeals Council decides to review a case, it shall mail a notice to all parties at their last known address stating the reasons for the review and the issues to be considered.

§ 404.971 Obtaining evidence from Appeals Council.

You may request and receive copies or a statement of the documents or other written evidence upon which the hearing decision or dismissal was based and a copy or summary of the transcript of oral evidence. However, you will be asked to pay the costs of providing these copies unless there is a good reason why you should not pay.

§ 404.975 Filing briefs with the Appeals Council.

Upon request, the Appeals Council shall give you and all other parties a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case. A copy of each brief or statement should be filed for each party.

§ 404.976 Procedures before Appeals Council on review.

(a) *Limitation of issues.* The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) *Evidence.* The Appeals Council will consider the evidence in the hearing record and any additional evidence it believes is material to an issue being considered. If the Appeals Council decides that more evidence is needed, it may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the information more quickly, it may do so unless it will adversely affect your rights.

(c) *Oral argument.* You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 days before the scheduled date.

§ 404.977 Case remanded by Appeals Council.

(a) *When the Appeals Council may remand a case.* The Appeals Council may remand a case to an administrative law judge so that he or she may hold a hearing and issue a decision or a recommended decision. The Appeals Council may also remand a case in which additional evidence is needed or additional action by the administrative law judge is required.

(b) *Action by administrative law judge on remand.* The administrative law judge shall take any action that is ordered by the Appeals Council and may take any additional action that is not inconsistent with the Appeals Council's remand order.

(c) *Notice when case is returned with a recommended decision.* When the administrative law judge sends a case to the Appeals Council with a recommended decision, a notice is mailed to the parties at their last known address. The notice tells them that the case has been sent to the Appeals Council, explains the rules for filing briefs or other written statements with the Appeals Council, and includes a copy of the recommended decision.

(d) *Filing briefs with and obtaining evidence from the Appeals Council.* (1) You may file briefs or other written statements about the facts and law relevant to your case with the Appeals Council within 20 days of the date that the recommended decision is mailed to you. Any party may ask the Appeals Council for additional time to file briefs or statements. The Appeals Council will extend this period, as appropriate, if you show that you had good cause for missing the deadline.

(2) All other rules for filing briefs with and obtaining evidence from the Appeals Council follow the procedures explained in this subpart.

(e) *Procedures before the Appeals Council.* (1) The Appeals Council, after receiving a recommended decision, will conduct its proceedings and issue its decision according to the procedures explain in this subpart.

(2) If the Appeals Council believes that more evidence is required, it may again remand the case to an administrative law judge for further inquiry into the issues, rehearing, receipt of evidence, and another decision or recommended decision. However, if the Appeals Council decides that it can get the additional evidence more quickly, it will take appropriate action.

§ 404.979 Decision of Appeals Council.

After it has reviewed all the evidence in the hearing record and any additional evidence received, the Appeals Council will make a decision or remand the case to an administrative law judge. The Appeals Council may affirm, modify or reverse the hearing decision or it may adopt, modify or reject a recommended decision. A copy of the Appeals Council's decision will be mailed to the parties at their last known address.

§ 404.981 Effect of Appeals Council's decision or denial of review.

The Appeals Council may deny a party's request for review or it may decide to review a case and make a decision. The Appeals Council's decision, or the decision of the

Regulations.

(1981) 20 CFR. § 404.957 (1981)

§ 404.957 Dismissal of a request for a hearing.

An administrative law judge may dismiss a request for a hearing under any of the following conditions:

(c) The administrative law judge decides that there is cause to dismiss a hearing request entirely or to refuse to consider any one or more of the issues because—

(1) The doctrine of *res judicata* applies in that we have made a previous determination or decision under this subpart about your rights on the same facts and on the same issue or issues, and this previous determination or decision has become final by either administrative or judicial action;

20 CFR § 404.947 (1980)

§ 404.947 Action by Appeals Council on review.

The Appeals Council may dismiss (see § 404.952) or, in its discretion, deny or grant a party's request for review of a presiding officer's decision, or may, on its own motion, within 60 days after the date of the notice of such decision, reopen such decision for review or for the purpose of dismissing the party's request for hearing for any reason for which it could have been dismissed by the presiding officer (see §§ 404.935 through 404.937). Notice of the action by the Appeals Council shall be mailed to the party at his last known address.

20 CFR 404.937 (1980)

§ 404.937 Dismissal for cause.

The presiding officer may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:

(a) *Res judicata.* Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision (see §§ 404.911, 404.918, 404.946, and 404.951.

20 CFR 404.967 (1981)

APPEALS COUNCIL REVIEW

§ 404.967 Appeals Council review—general.

If you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action. The Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge. The Appeals Council shall notify the parties at their last known address of the action it takes.

20 CFR § 404.968 (1981)

§ 404.968 How to request Appeals Council review.

(a) *Time and place to request Appeals Council review.* You may request Appeals Council review by filing a written request. Any documents or other evidence you wish to

have considered by the Appeals Council should be submitted with your request for review. You may file your request—

(1) Within 60 days after the date you receive notice of the hearing decision or dismissal (or within the extended time period if we extend the time as provided in paragraph (b) of this section);

§ 404.969 Appeals Council initiates review.

Anytime within 60 days after the date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken. If the Appeals Council does review the hearing decision or dismissal, notice of the action will be mailed to all parties at their last known address.

§ 404.970 Cases the Appeals Council will review.

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue that may affect the general public interest.

(b) If new and material evidence is submitted with the request for review, the Appeals Council shall evaluate the entire record. It will then review the case if it finds that the

administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently in the record.

The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended. The Appeals Council may also dismiss any proceedings before it if—

(a) You and any other party to the proceedings files a written request for dismissal; or

(b) You or any other party to the proceedings dies and the record clearly shows that dismissal will not adversely affect any other person who wishes to continue the action.

§ 404.972 Effect of dismissal of request for Appeals Council review.

The dismissal of a request for Appeals Council review is binding and not subject to further review.

§ 404.973 Notice of Appeals Council review.

When the Appeals Council decides to review a case, it shall mail a notice to all parties at their last known address stating the reasons for the review and the issues to be considered.

20 CFR § 404.975 (1981)

§ 404.975 Filing briefs with the Appeals Council.

Upon request, the Appeals Council shall give you and all other parties a reasonable opportunity to file briefs or

other written statements about the facts and law relevant to the case. A copy of each brief or statement should be filed for each party.

§ 404.976 Procedures before Appeals Council on review.

(a) *Limitation of issues.* The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) *Evidence.* The Appeals Council will consider the evidence in the hearing record and any additional evidence it believes is material to an issue being considered. If the Appeals Council decides that more evidence is needed, it may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the information more quickly, it may do so unless it will adversely affect your rights.

20 CFR § 404.987 (1981)

§ 404.987 Reopening and revising determinations and decisions.

(a) *General.* Generally, if you are dissatisfied with a determination or decision made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review. However, a determination or a decision made in your case may be reopened and revised. After we reopen your case, we may revise the earlier determination or decision.

(b) *Procedure for reopening and revision.* You may ask that a determination or a decision to which you were a party be revised. The conditions under which we will

reopen a previous determination or decision are explained in § 404.988.

§ 404.988 Conditions for reopening.

A determination, revised determination, decision, or revised decision may be reopened—

(a) Within 12 months of the date of the notice of the initial determination, for any reason;

(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case; or

§ 404.989 Good cause for reopening.

(a) We will find that there is good cause to reopen a determination or decision if—

(1) New and material evidence is furnished;

Section 5-42—16E of OHA Manual Relating to Own Motion Review.

E. *Releasing OM Notice Within Period for Initiating Review*

Regulations 404.969 and 416.1469 provide that the AC may decide to review an ALJ's decision or dismissal at any time within 60 days of the date of the ALJ's action. The AC's decision to review is evidenced by its notice of review. The date of its decision to review is evidenced by the date stamped on the notice.

A decision to initiate review may be understood as not having been conclusively made until a notice of review has been released into the mail system maintained by the United States Postal Service. Accordingly, the date stamped on the notice *must* coincide with the date the notice is placed in a mail receptacle of the Postal Service. (The franked envelopes in which the AC's notices are mailed are only occasionally postmarked. However, to attempt to assure that the date shown on the notice coincides with any postmark that may be affixed by the Postal Service, and thereby to avoid any unnecessary confusion as to the date of the decision to review, envelopes containing OM notices should be placed in an appropriate mail receptacle before the final collection scheduled for that receptacle on the date of mailing.)

An OM notice *must* be submitted to the AC within sufficient time for the notice to be considered, typed, and released into the postal system within 60 days of the ALJ's decision or dismissal. The procedures described in 5-42, paragraph C.4. are to be followed where necessary to assure satisfaction of the time limitation.

Section 216(j) of the Act, which extends a deadline date falling on a nonwork day to the first full work day immediately following the deadline date, applies to provisions in the law and regulations which set a deadline date

for taking certain actions. It is the policy of the AC that section 216(j) should not be invoked in any case in which OM is taken. Accordingly, where the last day for taking OM action under section 404.969 or section 416.1469 falls on a Saturday, Sunday, legal holiday or on any other day all or part of which is declared to be a nonwork day for Federal employees by statute or Executive Order, the AC *will not* extend the deadline date for taking OM review to the first full work day immediately following the deadline date.

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Section 1-922-10 OHA Manual.

b. A clerical error was made; or

c. There is an error on the face of the evidence on which the determination or decision is based.

Good cause for reopening a determination or decision shall be deemed to exist under the following circumstances in claims under title XI or Part A of title XVIII:

a. New and material evidence is furnished;

b. A clerical error has been made in the computation or recomputation of benefits; or

c. There is an error on the face of the evidence on which the determination or decision is based.

NOTE.—Good cause to reopen will not be found if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made.

1-922-10 *New and Material Evidence*

As a general rule, new and material evidence at the OHA level is new evidence which, in itself or when considered with the other evidence in the CF, would warrant an allowance.

Examples:

1. New medical evidence shows that the claimant's impairment *was* severe during the previously adjudicated period, and that an allowance based on the prior application is warranted.

2. New medical evidence shows that an originally favorable prognosis did not prove to be accurate, and that an allowance based on the prior application is warranted (3.g., it was believed that the claimant's broken hip would be healed within 12 months, but later medical evidence shows that the broken hip had not healed sufficiently within 12 months to permit the claimant's return to SGA).